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Supreme Court, U.S.
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No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PAUL D. CAREY
(Counsel of Record)
LIVINGSTON WERNECKE
MARGARET E. WETHERALD
BETTS, PATTERSON & MINES, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle, WA 98161-1090
(206) 292-9988

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, after ruling that a state tax exemption "violates [petitioner's] rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution," the state Supreme Court could nevertheless deny petitioner any refund or other retrospective relief.*

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* The issue presented is identical to that resolved by this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, No. 88-192, —— U.S. ——, 110 S. Ct. 2238 (June 4, 1990), except that in this case the basis for invalidating the underlying tax provision was the Equal Protection Clause of the Fourteenth Amendment rather than the Commerce Clause.

RULE 29.1 LIST OF PARTIES

The parties to the proceedings below were Associated Grocers, Inc. (petitioner here and respondent below) and the State of Washington, through its agency, the Department of Revenue (respondent here and appellant below).

Associated Grocers, Inc. has no parent corporation, and its subsidiaries are all wholly owned.

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IN THE

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OCTOBER TERM, 1990

No. ____

ASSOCIATED GROCERS, INC.,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, Associated Grocers, Inc. ("Associated Grocers"), respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Washington handed down shortly before this Court's June 4, 1990 decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, No. 88-192, ___ U.S. ___, 110 S. Ct. 2238 (1990). The state court denied petitioner any refund or other retrospective relief after ruling, based on established precedent, that a state tax exemption violated petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported as *Associated Grocers, Inc. v. State*, 114 Wash. 2d 182, 787 P.2d 22 (1990), and is reproduced as Appendix A (1a-17a). The unpublished Memorandum Opinion of the trial court is reproduced as Appendix B

(18a-28a). The unpublished trial court order holding part of the Washington business and occupation tax unconstitutional is reproduced as Appendix C (29a-31a). The trial court's unpublished order granting Associated Grocers a refund of tax is reproduced as Appendix D (32a-35a). The Washington Supreme Court's unpublished order denying reconsideration is reproduced as Appendix E (36a).

JURISDICTION

The Washington Supreme Court's opinion was entered on March 1, 1990. Timely cross-motions for reconsideration were denied on May 17, 1990. The Court has jurisdiction to review the Washington State Supreme Court's opinion by writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

Reproduced at Appendix F (37a-48a) are the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the Constitution of the State of Washington (art. 1 § 12), and the pertinent portions of the Revised Code of Washington §§ 82.03.010, .130, .180, .190, 82.04.220, 82.04.270, 82.32.050, .060, .090, .150, .160, .180, .190, .200, .210, .215 and .220. Washington Rules of Appellate Procedure 12.6 and 12.9 are reproduced at Appendix G (49a).

STATEMENT

In this case, the Supreme Court of Washington held, based upon long established precedent, that the state's business and occupation ("B&O") tax discriminated against petitioner, a grocery wholesaler, and in favor of its competitors, integrated grocery distributors, in violation of the Equal Protection Clause of the Fourteenth Amendment. However, shortly before this Court's de-

cision in *McKesson Corp. v. Division of Alcoholic Beverages*, No. 88-192, 110 S.Ct. 2238, the state court declined either to grant a refund to disfavored wholesalers like petitioner or to assess a retrospective additional tax on the favored competitors. That continuing uncorrected discrimination, squarely barred by *McKesson*, is the subject of this petition.

Petitioner Associated Grocers is a wholesaler of grocery items to its shareholders, who operate independently-owned retail grocery stores. Associated Grocers neither owns nor operates any retail grocery stores.[1]

Both petitioner and its independently owned customers compete with integrated grocery chains like Safeway[2] which conduct both wholesale functions and retail grocery store operations in one entity. While there is no "sale" or change of title when an integrated chain like Safeway distributes merchandise from its own central warehouse to its retail stores, Safeway otherwise performs the same wholesaling functions for its retail stores as Associated Grocers does for its retail grocery store customers.

The State of Washington imposes a business and occupation ("B&O") tax on wholesalers and those who perform wholesale functions under Wash. Rev. Code § 82.04.270, which is entitled "Tax on wholesalers, distributors" (39a-40a). The tax is imposed on wholesalers under Wash. Rev. Code § 82.04.270(1). Section 82.04.270(2)

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[1] The Associated Grocers warehouse and distribution center was originally formed as a co-op to provide the inventory needs of otherwise independent retail grocery stores. Former co-op members and other independent grocery store operators are now the sole shareholders of Associated Grocers, Incorporated.

[2] Although it filed a brief and was granted time to argue *amicus curiae* below, Safeway Stores, Inc. is not a party to this case. Its operations were used by the parties below to illustrate the difference in tax imposed on wholesalers (like Associated Grocers) and integrated chains (like Safeway) under Wash. Rev. Code § 82.04.270 (39a-40a).

extends the levy to integrated chain "distributors" who perform wholesale functions similar to those performed by a wholesaler.[3] The statute itself expressly mandates equal taxation of wholesalers (like petitioner) and integrated chains (like Safeway):

> The intent hereof [is] to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales.

Wash. Rev. Code § 82.04.270 (39a). Despite that purpose, however, the statute contains an important exemption that is not applied equally: a proviso states that businesses (like Safeway) that engage in wholesaling functions by distribution of articles "from their own warehouses . . . to their own retail stores . . . shall not be liable" for the tax under Wash. Rev. Code § 82.04.270(2) to the extent such articles were purchased from a wholesaler who had previously paid a B&O tax to the State of Washington upon the same articles. But wholesalers, like petitioner, were liable for the B&O tax under Wash. Rev. Code § 82.04.270(1) even if they purchased identical articles from a wholesaler who previously paid a B&O tax to the State of Washington upon those articles. In effect, the partial exemption granted a tax preference to integrated chains that was denied to wholesalers.

Petitioner paid the discriminatory portion of the subject tax "under duress." *McKesson*, 110 S. Ct. at 2247. Under Washington law, failure to pay a tax when due leads, without a court hearing on the merits, to levy and execution, revocation of the taxpayer's business license, and penalties of up to 25% of the tax due, plus interest.

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[3] Wash. Rev. Code § 82.04.270 requires uniform and equitable rules for determining the taxable value of articles transferred by internal distribution so that such valuation shall correspond as nearly as possible to the gross proceeds from sales at wholesale of articles of like character and quality and in similar quantities by other taxpayers.

Wash. Rev. Code §§ 82.32.210, .215, .220 (45a-48a) and .090[4] (42a). Petitioner also took all steps required by state law to preserve its claim to a refund.[5]

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[4] Washington law provides no "predeprivation process," *McKesson*, 110 S. Ct. at 2247, by which a discriminatory tax may be challenged by a taxpayer who cannot show immediate hardship. Wash. Rev. Code § 82.32.150 reads in pertinent part as follows:

> All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

The first quoted sentence expressly requires the taxpayer to pay the tax in full *before* challenging it in court. The second sentence appears to allow for the possibility of an injunction against an unconstitutional assessment, but the Supreme Court of Washington ruled in *National Can Corp. v. Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988), that an injunction is not available to a taxpayer, like petitioner, for which ". . . a refund suit constitutes an adequate legal remedy, foreclosing a preliminary injunction . . . ." *Id.* at 891, 749 P.2d at 1292. In a previous decision in the same case, the Washington Supreme Court vacated a trial court's injunction prohibiting collection of the challenged tax holding, *inter alia*, that the inconvenience of payment was not sufficient "actual and substantial injury" to warrant injunctive relief. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wash. 2d 785, 638 P.2d 1213 (1982).

[5] A Washington taxpayer may pay a challenged tax when due and then either seek a refund in court under Wash. Rev. Code § 82.32.180 (43a-44a) or through administrative proceedings under Wash. Rev. Code §§ 82.03.010, .130, .180, .190 (37a-39a) and 82.32.060, .160, .190, .200 (41a-45a). Other administrative proceedings are available, but only after an audit and under the threat of penalties and other sanctions for nonpayment of the challenged tax when due. Wash. Rev. Code §§ 82.03.190 (38a), 82.32.050, .090, .210, .215, .220 (42a-48a). Washington law expressly provides that tax payments need not be made under protest in order to preserve a tax refund claim. Wash. Rev. Code § 82.32.180 (44a).

Petitioner then commenced this action seeking a determination that the tax scheme under Wash. Rev. Code §§ 82.04.270(1) and (2) violates the Equal Protection Clause of the Fourteenth Amendment as well as provisions of the Constitution of the State of Washington. The Complaint prayed for a refund of taxes that would not have been due if the exemption had applied equally to wholesalers like Associated Grocers. On cross-motions for partial summary judgment, the state trial court found that Wash. Rev. Code § 82.04.270 creates a single class of taxpayers comprised of both wholesalers (like Associated Grocers) and integrated chain "distributors" (like Safeway) and that, because the partial exemption did not apply alike to all members of the class, there was an "obvious violation of equal protection which requires redress." (23a)

The trial court therefore fashioned a two part remedy. First, the court extended the partial exemption prospectively to Associated Grocers on terms identical to those provided in the statute for integrated chains. Second, to remedy the past denial of equal protection to Associated Grocers, the court awarded petitioner a refund of $9,938,529. (32a-34a)

The State appealed, and the Washington Supreme Court affirmed in part and reversed in part. The court noted that:

> This court has consistently treated distributors and wholesalers as members of a single class under the statute and its forerunners. *See e.g., Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936); *Air-Mac, Inc. v. State*, 78 Wash. 2d 319, 474 P.2d 261 (1970).

Associated Grocers, 114 Wash. 2d at 188, 787 P.2d at 25 (6a). The Washington Supreme Court then specifically agreed with the trial court that the tax preference for integrated chains was unconstitutional:

> The exemption in Wash. Rev. Code § 82.04.270(2) is applied only to [integrated] distributors, and not to wholesalers. The members of the class are thus treated differently. . . . The exemption, which applies only to distributors, violates [petitioner's] rights under the equal protection clause of the fourteenth amendment to the United States Constitution and the privileges and immunities clause of the state constitution. . . .

Id. (6a).

Notwithstanding this ruling, the Washington Supreme Court reversed the trial court's award of a refund to petitioner and fashioned a prospective remedy by severing the discriminatory exemption from the statute. The court first ruled that petitioner was not entitled to a refund because only the exemption was unconstitutional, and the tax itself was not "collected in violation of the constitution." *Id.* at 190, 787 P.2d at 26 (9a). The court then noted the argument that petitioner's competitors "should now be assessed for taxes they should have paid" in the past, but the court rejected this course because "great financial and administrative hardship would result. . . ." *Id.* at 190-91, 787 P.2d at 27 (9a). Rather than enforce petitioner's due process rights, the court said that petitioner's request for a remedy for years of unconstitutional discrimination between it and other members of the same taxpayer class should be "addressed to the legislature." *Id.* at 191, 787 P.2d at 27 (9a).[3]

Petitioner made a timely motion for reconsideration on the refund issue pointing out, *inter alia*, that the com-

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[3] As the Court itself acknowledged, however, a statutory right to the refund of a tax paid "in excess of that properly due" has long been provided for under Washington Revised Code 82.32.060. *Associated Grocers*, 114 Wash. 2d at 188, 787 P.2d at 27 (7a). Associated Grocers invoked that legislative act as the stated basis for its refund claim, and the trial court specifically granted a refund to Associated Grocers "pursuant to RCW § 82.32.060." (34a) The statute was noted and disregarded by the Washington Supreme Court in its denial of retrospective relief to Associated Grocers.

plete denial of retrospective relief deprived it of its rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Petitioner cited to the Washington Supreme Court the decisions of this Court, including *Carpenter v. Shaw*, 280 U.S. 363 (1930), *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), on which this Court later relied in *McKesson*. The state filed a cross-motion for reconsideration, urging the state supreme court to reconsider its ruling that the exemption was unconstitutional. The Court denied the cross-motions for reconsiderations without comment on May 17, 1990. (36a)

Shortly thereafter, on June 4, 1990, this Court issued its decision in *McKesson*, 110 S. Ct. 2238. The Washington Supreme Court's complete denial of retrospective relief to Associated Grocers is in direct conflict with the *McKesson* decision.

Washington's rules of appellate procedure contain no mechanism for revisiting the Washington Supreme Court's March 1, 1990 decision and May 17, 1990 denial of reconsideration. Thus, this petition.

REASONS FOR GRANTING THE PETITION

I. THE STATE SUPREME COURT'S DENIAL OF RETROSPECTIVE RELIEF SQUARELY CONFLICTS WITH McKESSON.

The Washington Supreme Court's denial of retrospective relief to petitioner was without the benefit of this Court's subsequent guidance in *McKesson*, No. 88-192, 110 S. Ct. 2238 (1990). In that decision, this Court restated the Due Process Clause requirement that a taxpayer who has no meaningful predeprivation remedy for an unconstitutional state tax must be afforded meaningful retrospective relief when, after paying the tax under

duress, it successfully challenges the constitutionality of the tax based on established precedent. In this case, the Washington Supreme Court ruled that the State B&O tax violated petitioner's rights under the Equal Protection Clause but, having so ruled, the court then denied petitioner the due process safeguard of meaningful retrospective relief. This Court should grant the petition of Associated Grocers and remand in order to afford the state court an opportunity to conform its decision to the Due Process Clause requirements and this Court's decision in *McKesson*. 110 S. Ct. 2238.[7]

The Washington Supreme Court made exactly the same error as the Florida Supreme Court had made in the *McKesson* case: having struck down a tax preference as discriminatory, it nevertheless ruled that the disfavored taxpayer was not entitled to a refund or other retrospective relief, because the taxpayer *could have been* lawfully taxed at the same rate if only its competitors had not been given the unlawful preference. The Washington

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[7] This case, like *McKesson*, does not involve any issue as to whether the underlying constitutional decision should be applied prospectively or retrospectively. *See American Trucking Ass'n, Inc. v. Smith*, —— U.S. ——, 110 S. Ct. 2323 (1990); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Washington Supreme Court decision on the underlying constitutional issue rested on well-established principles of Equal Protection Clause jurisprudence. The Washington Supreme Court noted that it had "consistently treated distributors and wholesalers as members of a single class under the statute," *Associated Grocers*, 114 Wash. 2d 188, 787 P.2d at 25 (6a), and arbitrary distinctions, for tax purposes, between members of a single class have been held to violate the Equal Protection Clause at least since *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910). Thus the holding in *Hillsborough v. Cromwell*, 326 U.S. 620 (1946), reiterated by this Court in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989), that

> The Equal Protection Clause of the Fourteenth Amendment protects the individual from State action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

Supreme Court began by drawing a basic, but erroneous, distinction between cases where the complaining taxpayer is overtaxed and cases where others in the class are undertaxed:

> Tax refunds are not mandated when a statutory scheme is found to be unconstitutional except when taxes were collected in violation of the constitution. [Petitioner] does not argue that the *tax levied* under Wash. Rev. Code § 82.04.270(1), which it paid and for which it seeks a partial refund, is unconstitutional. Rather its contention, with which we agree, is that the *partial exemption* granted distributors under Wash. Rev. Code § 82.04.270(2) is unconstitutional. . . . [Since the legislature did not authorize extending the exemption to petitioner], we hold that [petitioner] is not entitled to a refund of any portion of the taxes it paid.

Associated Grocers, 114 Wash. 2d at 190, 787 P.2d at 26-27 (9a) (citations omitted). The Washington Supreme Court then considered and rejected the alternative of righting the inequity by assessing petitioner's competitors:

> Arguably distributors, who have benefited for 30 years from an invalid exemption, should now be assessed for taxes they should have paid. However, . . . great financial and administrative hardship would result from retroactive application of our decision in this case. We therefore apply our holding prospectively only.

Id. at 191, 787 P.2d at 27 (9a).

However, reasoning which leads to denial of a refund to the disfavored taxpayer but no retrospective assessment on the preferred taxpayers, was squarely condemned by this Court in *McKesson*. There, too, the state's contention was that:

> [T]he State need not *actually* impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim,

> the State need only place petitioner in the same tax position that petitioner *would have been placed* [in] by such a hypothetical scheme. Specifically, respondents contend that the State, had it known that the Liquor Tax would be declared unconstitutional, would have imposed the higher flat tax rate on all distributors.

McKesson, 110 S. Ct. at 2253 (emphasis added). This Court's response was firm:

> We implicitly rejected this line of reasoning in *Montana National Bank* and *Bennett*,[8] and we expressly do so today. . . . [The State's] approach is inconsistent with the nature of the State's due process obligation.

Id.

This Court explained that where the essence of the constitutional violation was to impose a "relative disadvantage" on one group of taxpayers, "the State's offer to restore petitioner only to the same *absolute* tax position it would have occupied if taxed according to a 'hypothetical' nondiscriminatory scheme does not in hindsight avoid the unlawful deprivation." *Id.* at 2253. The state's duty, the Court squarely held, was to eliminate the disparity in tax treatment during the past period. *Id.* at 2254.

As this Court stated in *McKesson*:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 110 S. Ct. at 2247.

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[8] *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499; *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239.

As shown above, all of the elements of that holding are present here. Washington law placed petitioner under duress to pay the subject tax before it could challenge the constitutionality of that tax in a postpayment refund action. Predeprivation injunctive relief is not available to a taxpayer for which a later refund is an adequate remedy. The Washington Supreme Court found the subject tax unconstitutional based upon established precedent. The court therefore had no alternative under the Due Process Clause of the Fourteenth Amendment but to grant meaningful retrospective relief to Associated Grocers. The court's refusal to do so is in direct conflict with traditional due process analysis and this Court's ruling in *McKesson*, 110 S. Ct. at 2247.

II. THE STATE SUPREME COURT'S DENIAL OF RETROSPECTIVE RELIEF ALSO SQUARELY CONFLICTS WITH TRADITIONAL DUE PROCESS ANALYSIS.

In bringing this action, Associated Grocers sought past and future relief from unequal tax treatment, just as did the taxpayers in *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499, and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239.

In the *Montana Nat'l Bank* case, the applicable federal statute called for equal taxation of national and state banks. However, a state taxing statute required national banks to pay an unequal and greater tax than state banks. This Court held that prospective relief alone "did not cure the mischief which had been done under the earlier construction." *Montana Nat'l Bank*, 276 U.S. at 504. Accordingly, this Court held that:

> The taxpayer could not be deprived of its legal right to recover the amount of tax unlawfully exacted of it by the later [Montana Supreme Court] decision which, while repudiating the construction under

> which the unlawful exaction was made, left the monies thus exacted in the public treasury.

Id. at 504-5.

This Court also ordered a retroactive refund in *Iowa-Des Moines*, an Equal Protection Clause case. As Justice Brandeis there explained:

> The [bank's] rights were violated, and the cause of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all grounds for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the [bank's] grievances would have been redressed, for these are not primarily over-assessment. The right invoked is that to equal treatment; and such treatment will be obtained if either their competitors' taxes are increased or their own reduced.

Id. at 247.

In *McKesson*, 110 S. Ct. at 2250, this Court quoted that portion of *Iowa-Des Moines* and further described the case as follows:

> But the State did not elect to set matters right by collecting additional taxes from the banks' competitors for the four tax years encompassed by the suit. And the Court found it "well settled" that the banks could not be "remitted to the necessity of awaiting such action by the state officials upon their own initiative." The Court held, therefore, that the banks were "entitled to obtain in these suits refund of the excess of taxes exacted from them."

(Citations omitted.) The *Montana Nat'l Bank* and *Iowa-Des Moines* holdings remain vital law today.

The Washington Supreme Court chose *not* to "set matters right" for petitioner. Instead, the court per-

petuated the past denial of equal protection by denying both a refund of the excess tax paid by petitioner and an assessment against the favored taxpayers. Its holding is in direct conflict with this Court's long standing decisions in *Montana Nat'l Bank* and *Iowa-Des Moines*, as carried forward in *McKesson*.

III. ONLY THIS COURT CAN NOW PROTECT PETITIONER'S DUE PROCESS RIGHTS.

In the procedural posture of this case, only this Court can protect Associated Grocers' federal due process right to meaningful retrospective relief. The mandate cannot be recalled under Washington's Washington Rules of Appellate Procedure 12.9 (49a) because the circumstances of this case do not meet the narrow criteria of the rule. Moreover, Washington Rule of Appellate Procedure 12.6 (49a) bars the Washington Supreme Court from staying issuance of its mandate to allow review by this Court.

Given the inability to recall or stay the mandate, petitioner has no other options. Appeal to this Court is the only avenue remaining for petitioner to obtain the relief to which it is entitled under the Due Process Clause of the Fourtenth Amendment to the Constitution of the United States.

CONCLUSION

The *McKesson* decision is controlling law which requires, under the Due Process Clause of the Fourteenth Amendment, that the Washington courts provide meaningful retrospective relief where unconstitutional state tax legislation results in an unlawful exaction under duress. The State of Washington has denied that due process safeguard to petitioner in this case. In the absence of action by this Court, Associated Grocers and other Washington litigants will be denied the meaningful retrospective relief required under *McKesson*.

In *McKesson*, the Court noted that Florida could cure its discriminatory tax "through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period." 110 S. Ct. at 2258. The Court reversed and remanded for further proceedings.

In the present case, the Supreme Court of Washington did not have the guidance of this Court's opinion in *McKesson*, which was decided shortly after the state court denied reconsideration. Accordingly, the Court may wish to consider a summary remand of this case so that the state court may reconsider its denial of retrospective relief to Associated Grocers in light of *McKesson*.

Respectfully submitted,

PAUL D. CAREY
(Counsel of Record)
LIVINGSTON WERNECKE
MARGARET E. WETHERALD
BETTS, PATTERSON & MINES, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle, WA 98161-1090
(206) 292-9988

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for Petitioner

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF WASHINGTON

[No. 55686-5. En Banc. March 1, 1990.]

ASSOCIATED GROCERS, INC.,
Respondent,

v.

THE STATE OF WASHINGTON,
Appellant.

Kenneth O. Eikenberry, Attorney General, and *Phyllis K. Macleod, Assistant,* for appellant.

Betts, Patterson & Mines, P.S., by *Paul D. Carey* and *Livingston Wernecke,* for respondent.

C. James Judson, Susan G. Duffy, and *John Parnass* on behalf of Safeway Stores, amici curiae for respondent.

SMITH, J.—This case involves the basic question whether the business and occupation tax, RCW 82.04.270 (2), allowing a tax exemption to distributors, but not to wholesalers, is invalid. We answer that it is.

The State of Washington appeals from a judgment of the Thurston County Superior Court awarding to Respondent Associated Grocers, Inc. (Associated) a refund of $9,938,529, plus interest, in business and occupation taxes. The trial court held that an exemption under RCW 82.04.270(2) violated Associated's rights under the equal protection clause of the fourteenth amendment to the United States Constitution and Const. art. 1, § 12, because the statute did not tax distributors, such as

Safeway Stores, Inc.,[1] at the same rate as wholesalers, despite an express legislative intent to tax them at the same rate.

We agree that all members of a designated class must be treated equally under the statute. However, we hold that the proper remedy consists solely of striking the offending tax exemption. Therefore, we reverse in part and affirm in part the judgment of the Thurston County Superior Court.

This case presents two questions:

1. Whether a portion of RCW 82.04.270(2), allowing a tax exemption to distributors, but not wholesalers, is invalid because it is a violation of wholesalers' equal protection rights; and,

2. If the exemption is invalid, whether extension of the exemption to wholesalers is the appropriate remedy.

The material facts are not in dispute. Respondent Associated Grocers, Inc., is a Washington corporation engaged in the business of wholesaling grocery items. Associated supplies independently owned retail grocery stores. Although it makes wholesale sales to its customers, Associated neither owns nor operates any retail grocery stores.

In contrast, Safeway Stores, Inc., a vertically integrated business,[2] and a competitor of Associated and

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[1] Although it filed a brief and was granted time to argue as *amicus curiae*, Safeway Stores, Inc., is not a party to this case. Its operations have been used by both parties to illustrate the tax structure applicable to Associated's claim.

[2] A "typical vertical division of merchandising" is one where "goods are sold by manufacturers/processors to a jobber/wholesaler and on to the retailer for sale to the ultimate consumer." *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 761, 453 P.2d 870 (1969). A "vertically integrated" business is one which combines one or more of these levels. In Safeway's system, the relevant integration is of the wholesale functions and retail operations.

Associated's independently owned customers, makes no sales when it distributes grocery items from its warehouses to Safeway-owned retail stores. There is no change of title when Safeway distributes merchandise to its retail stores, but it performs wholesaling functions similar to those performed by Associated for its customers.

The taxation scheme for wholesale businesses under RCW 82.04.270 imposes a business and occupation tax (tax) upon wholesalers such as Associated under subsection (1), as well as upon "distributors" (who perform functions equivalent to wholesaling functions), such as Safeway, under subsection (2). However, because of an exemption in RCW 82.04.270(2), distributors are not required to pay the tax when they distribute merchandise they have purchased from a wholesaler who previously paid the State a tax on the same merchandise. There is no exemption for wholesalers in subsection (1) of the statute. Associated thus is not exempted from paying the tax on merchandise it has purchased from another wholesaler who previously paid the State a wholesaling tax on the same items.

Associated brought this matter before the Thurston County Superior Court, claiming that the tax scheme denied it equal protection under the laws. Both parties moved for summary judgment. In his memorandum opinion dated February 25, 1988, the Honorable Daniel J. Berschauer concluded:

> The exemption of RCW 82.04.270 as it presently is applied denies wholesalers equal protection of the law. The appropriate remedy is to require the State to allow [Associated] to claim a refund for taxes paid in excess of what would have been required had the exemption applied to [Associated]. [Associated]'s motion for summary judgment is granted and the State's motion for summary judgment is denied.

On October 11, 1988, Judge Berschauer entered judgment in favor of Associated in the amount of $9,938,529 plus interest.

The State appealed directly to this court under RAP 4.2(a)(2) and (4). Safeway Stores, Inc., appeared as *amicus curiae.*

This dispute centers on interpretation of the wholesalers business and occupation tax statute. That statute, RCW 82.04.270, "Tax on wholesalers, distributors", provides, in relevant part:

> (1) Upon every person . . . engaging within this state in the business of making sales at wholesale; [3] as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.
>
> (2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent

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[3] "Sale at wholesale" is defined in RCW 82.04.060, which provides in relevant part:

" 'Sale at wholesale' or 'wholesale sale' means any *sale* of tangible personal property . . . which is not a sale at retail . . . ." (Italics ours.)

of the value of the article so distributed as of the time of such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to the purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further*, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

The parties agree that the constitutional question presented by this statutory scheme should be analyzed under the "minimal scrutiny" or "rational basis" test announced in *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). Using this test, the court makes three inquiries: (1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the class; and, (3) whether the challenged classification bears any rational relation to the purposes of the challenged statute. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 835-36, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). If each inquiry is answered "yes," then the statutory clasification would be constitutional.

In this case, the trial court considered the statute as a whole and its legislative purpose and concluded that the

Legislature created a single class of taxpayers under RCW 82.04.270 and that the Legislature included distributors, as well as wholesalers, within that class.

The plain language of the statute supports the trial court's conclusion. RCW 82.04.270 is entitled "Tax on wholesalers, distributors". Subsection (1) establishes the tax and applies it to wholesalers. Subsection (2) extends the levy to "person[s] engaged in the business of distributing . . .". Further, subsection (2) announces a legislative intent "to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesalers". This expresses an intent to assure that the tax is identical for both subclasses within the class. This court has consistently treated distributors and wholesalers as members of a single class under the statute and its forerunners. *See, e.g., Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936); *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970).

The exemption in RCW 82.04.270(2) is applied only to distributors, and not to wholesalers. The members of the class are thus treated differently. The first inquiry under the *Yakima County* test, then, is answered "no." The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the fourteenth amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. art. 1, § 12). Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional. It is not necessary to consider the second and third inquiries under the *Yakima County* test.

The more difficult question in this case is what the appropriate remedy should be.

The remedy provided by the trial court was to extend the distributors' exemption of subsection (2) to the

wholesalers taxed under subsection (1). Further, the court ordered the State to refund to Associated, subject to the statute of limitations on refunds,[4] the tax Associated would not have paid if the exemption applied to wholesalers, as well as distributors. The remedy sought by Associated was exemption and refund.

The State contends that the appropriate remedy would be simply to strike the exemption from the statute without providing a refund to Associated.

The State cites as authority for its position RCW 82.98.030 (invalidity of part of title not to affect remainder), which provides in relevant part:

> If any chapter, section, subdivision of a section, paragraph, sentence, clause or word of this title for any reason shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of this title but shall be confined in its operation to the chapter, section, subdivision of a section, paragraph, sentence clause or word of the title directly involved in the controversy in which such judgment shall have been rendered. . . . It is hereby expressly declared that had any chapter, section, subdivision of a section, paragraph, sentence, clause, word or any person, corporation, association or class of persons, corporations or associations as to which this title is declared invalid been eliminated from the title at the

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[4] Former RCW 82.32.060 provides:

"If, upon receipt of an application by a taxpayer for a refund . . ., it is determined by the department that within the statutory period for assessment of taxes prescribed by RCW 82.32.050 a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at [the taxpayer's] option. No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made . . . ."

> time the same was considered the title would have nevertheless been enacted with such portions eliminated.

This is a typical severance clause providing that if a portion of RCW Title 82 is declared invalid, it is to be stricken from the statute and the remaining language given full effect.

Although the trial court's extension of the exemption to wholesalers, as well as distributors, is based upon a conclusion that the exemption is invalid, the court's remedy goes beyond simply removing the offending language from the statute. Rather, the trial court's remedy in effect amends the word "subsection" in the exemption to read "section," thus extending the tax exemption to both wholesalers under subsection (1) and to distributors under subsection (2). This is not the correct remedy.

The Legislature is presumed to understand the meaning and use of ordinary and precise terms like "subsection." *See, e.g., Union Oil Co. v. State*, 2 Wn.2d 436, 442, 98 P.2d 660 (1940). In other portions of subsection (2) there are references to "section." The Legislature obviously was aware of the distinction between the two words. Further, substituting one word for another under these circumstances is inconsistent with the severance clause.

We then focus upon repugnancy. Where a proviso is wholly repugnant to the enacting clause of a statute, the proviso is inoperative and void. *McKnight v. Hodge*, 55 Wash. 289, 104 P. 504 (1909); *State ex rel. Wilson v. King Cy.*, 7 Wn.2d 104, 109 P.2d 291 (1941). Under that authority, we conclude that the proviso exempting distributors from the tax is repugnant to the enacting clause in RCW 82.04.270(2) and that the appropriate remedy is simply to strike the offending portion.

We now address the question whether Associated is entitled to a refund.

Tax refunds are not mandated when a statutory scheme is found to be unconstitutional except when taxes were collected in violation of the constitution. *See National Can Corp. v. Department of Rev.*, 109 Wn.2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, ___ U.S. ___, 100 L. Ed. 2d 615, 108 S. Ct. 2030 (1988). Associated does not argue that the *tax levied* under RCW 82.04.270 (1), which it paid and for which it seeks a partial refund, is unconstitutional. Rather, its contention, with which we agree, is that the *partial exemption* granted distributors under RCW 82.04.270(2) is unconstitutional. We can grant a refund to Associated only if we conclude that the Legislature intended the exemption to apply to wholesalers as well as distributors. We cannot reach that conclusion under the facts in this case. Accordingly, we hold that Associated is not entitled to a refund of any portion of the taxes it paid. Compare *National Can Corp. v. Department of Rev.*, 109 Wn.2d 878, 890, 749 P.2d 1286, *appeal dismissed, cert. denied*, ___ U.S. ___, 100 L. Ed. 2d 615, 108 S. Ct. 2030 (1988).

Arguably distributors, who have benefited for 30 years from an invalid exemption, should now be assessed for taxes they should have paid. However, all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of our decision in this case. We therefore apply our holding prospectively only. *See Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984).

Associated apparently chose neither to bring this action nor to seek legislative relief before it paid substantial sums in taxes for as many as 30 years. Whether Associated should now be granted monetary relief and whether an exemption from duplicate taxes on wholesaling should apply to both wholesalers and distributors are matters which should be addressed to the Legislature.

We affirm in part and reverse in part the judgment of the Thurston County Superior Court in the following manner:

1. We affirm the trial court's determination that the exemption in RCW 82.04.270 is invalid because it establishes different tax rates for different members of the same taxpaying class created under the statute;

2. We reverse the trial court's extension of the tax exemption to the remaining members of the class; and instead we strike as invalid the following language from RCW 82.04.270(2), effective April 1, 1990:

> *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110.

and,

3. We reverse the trial court's award of $9,938,520 to Respondent Associated Grocers, Inc., and remand the case for entry of appropriate orders.

CALLOW, C.J., DORE, ANDERSON, and DURHAM, JJ., and MITCHELL, J. Pro Tem., concur.

DOLLIVER, J. (dissenting)—The majority finds unconstitutional the proviso in RCW 82.04.270 which exempts some retailers performing wholesale-type functions (distributors) from paying a business and occupation (B&O) tax on goods purchased from a wholesaler who has already paid the tax. This conclusion stems from the majority's erroneous assumption that the Legislature intended to treat distributors and wholesalers under the statute as members of the same taxpaying class.

I would find the Legislature intended to establish two classes of taxpayers under RCW 82.04.270. I would also find that a reasonable basis for distinguishing wholesalers and distributors does exist, that the classifications themselves are rationally related to the purpose of the statute, and that the statute is constitutional.

Plaintiff Associated Grocers, Inc. (Associated) is a Washington corporation engaged in the business of selling grocery items at wholesale. It makes a majority of its sales to shareholders who are retail grocery stores. Although Associated purchases its goods from a variety of sources, it sometimes purchases from other wholesalers who have previously paid a B&O tax on the items. Because Associated is in the wholesale business, it pays a wholesale business tax pursuant to RCW 82.04.270(1).

After nearly 30 years of paying the B&O tax under the statute, Associated brought the present suit against the State of Washington. It alleges RCW 82.04.270 is unconstitutional under article 1, section 12 of the Washington State Constitution and the equal protection clause of the fourteenth amendment to the United States Constitution. Associated seeks to recover the amount of the B&O tax it would have saved if the same exemption afforded certain distributors was also extended to wholesalers.

In January 1988, the trial court heard arguments on Associated's summary judgment motion as well as the State's cross motion. The trial court found the exemption in RCW 82.04.270 unconstitutional on the grounds it denied wholesalers equal protection of the law. Rather than strike the exemption from the statute, however, the court extended the exemption to apply equally to wholesalers who could prove they had purchased items from other wholesalers who had previously paid a B&O tax. This resulted in the trial court awarding Associated a tax refund in the amount of $9,938,529, plus interest. The State subsequently appealed to this court.

At the outset, it must be emphasized that the party challenging the classification has the heavy burden of overcoming the presumption of a statute's constitutionality. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 835, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). I believe Associated has failed to meet this burden.

The best indication that the Legislature intended to create two classes of taxpayers under the statute is found in the lengthy history of amendments to the statute. In 1935, the original version of the statute was enacted for the purpose of levying a tax on retailers performing functions similar to wholesalers. Laws of 1935, ch. 180 § 4, p. 709. The original version contained no limitations or provisos. In 1937, the Legislature increased the tax rate of distribution by amending the statute. Laws of 1937, ch. 227, § 1, p. 1138. In 1941, the statute was again amended by deleting language which levied the tax on retailers performing wholesale-like functions. Laws of 1941, ch. 178, § 1, p. 480. By removing the tax on retailers while maintaining the levy against wholesalers, the Legislature apparently intended to treat these business entities separately by taxing them differently. This disparate tax treatment remained in effect until 1955.

In 1955, the Legislature again amended the statute by reinstating the tax which had been repealed in 1941. This was done by imposing "a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesalers, but not actually making sales". Laws of 1955, ch. 389, § 47, p. 1671. By levying a tax *equal* to the tax imposed on wholesalers, as opposed to levying the *same* tax, the Legislature appears to have intended to distinguish wholesalers as one class of taxpayers and distributors as another. In 1959, the statute was again amended. Laws of 1959, 1st Ex. Sess., ch. 5, § 3, p. 1666. This time, the Legislature went one step further in treating the two classes separately by

levying one tax on wholesalers under subsection (1) and then levying a "tax equal to the wholesaler's tax" on qualifying distributors under subsection (2). Subsection (2) also included the following proviso:

> *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110.

From a historical perspective, the amendments to the statute are indicative of the Legislature's intent to treat wholesalers and distributors as two separate classes of taxpayers. In fact, the 1959 amendment, which placed wholesalers under subsection (1) and distributors under subsection (2), is the best indication of the intent to treat these two clases of taxpayers separately. For those who may believe the issue to be arguable it should be pointed out that there is a strong presumption a revenue statute is constitutional, and, where there is doubt, the issue will be resolved in favor of constitutionality. *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 6, 211 P.2d 561 (1949).

The majority cites *Benjamin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936) and *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970) for the proposition that "[t]his court has consistently treated distributors and wholesalers as members of a single class under the statute and its forerunners." Majority, at 187. From this the majority would apparently infer that the court does not recognize a distinction between wholesalers and distributors. This would be inaccurate and unwarranted. The issue in both those cases was not whether the Legislature could make the distinction between distributors and wholesalers nor was that issue ever in question. Rather, both cases concerned the

particular classification in which the taxpayer should be placed by the taxing authority.

If, as I believe has been demonstrated, the legislative intent was to create two separate classes of taxpayers the next issue becomes whether there is some basis for reasonably distinguishing between those within and without the designated class. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs, supra* at 835-36. In the context of this case, the question is whether the Legislature acted reasonably in separating wholesalers and distributors into separate classes of taxpayers.

As the State rightfully points out in its brief, legislative bodies have very broad powers to create classifications in the development of legislation. *Sonitrol Northwest, Inc. v. Seattle*, 84 Wn.2d 588, 590, 528 P.2d 474 (1974). The test for purposes of classification is whether " 'any state of facts reasonably can be conceived that would sustain the classification.' " *Sonitrol*, at 590 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959)). Furthermore, the Legislature has even broader discretion and greater power in making classifications for taxation than it has for regulation. *Sonitrol*, at 591 (citing *Texas Co. v. Cohn*, 8 Wn.2d 360, 376, 112 P.2d 522 (1941)).

The most obvious difference between wholesalers and retailers who perform wholesale functions is best described in the words of the trial court itself:

> In this case the classes distinguish between businesses which are solely involved with sales at wholesale from businesses which perform wholesaling functions but do not ever sell at wholesale. AG [Associated Grocers] has no retail stores. Safeway operates numerous retail stores. AG pays no B&O tax on retail sales. Safeway pays B&O tax on retail sales. In summary, there are numerous and real distinctions

> between AG and Safeway which arguably meet the rational basis test.

Clerk's Papers, at 93.

The point made by the trial court is that there are real differences between the method of business employed by wholesalers and retailers. A different method of business has already been recognized as grounds for distinguishing taxpayers. *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wn.2d 355, 368, 687 P.2d 186 (1984). Therefore, a reasonable basis exists for the Legislature's decision to separate the taxpayers here into two classes.

If a reasonable basis for the distinction is found, the question then becomes whether the classifications are rationally related to the purposes of the statute. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs, supra*, at 835-36. Here, the challenger must show conclusively that the classification is contrary to the legislation's purpose. *Yakima*, at 836.

In *Air-Mac, Inc. v. State, supra* at 326, the court explained that the purpose of RCW 82.04.270(2) was to "neutralize the tax advantage of a horizontal merchandising scheme used to eliminate the normal vertical wholesaling functions." In *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 453 P.2d 870 (1969), this court articulated the Legislature's purpose in enacting RCW 82.04.270 as follows:

> It was the obvious intent of the legislature to tax as a "wholesaling function" the horizontal merchandising scheme which competes with and, except for change of title to goods, is essentially similar to the typical vertical division of merchandising whereby goods are sold by manufacturers/processors to a jobber/wholesaler and on to the retailer for sale to the ultimate consumer.

Foremost, at 761.

These two cases assist in clarifying the basic purpose underlying the statute which is to attempt to equalize the disparate tax burden which exists by virtue of the differing internal structures between wholesalers and distributors who perform wholesale-like functions. The legislative history previously recounted also supports this interpretation of the purpose.

Furthermore, classifying wholesalers separately from distributors under the statute is rationally related to addressing the problem of equalizing the tax structures of these two types of businesses. Unless the Legislature is able to tax one class of taxpayers differently from the other, it will remain powerless to try and halt inequitable tax treatment. The majority completely fails to appreciate this point.

The Legislature in RCW 82.04.270 addressed a particular aspect of competition at the retail level. It may well be there are inadequacies within the statute and that further legislative action would be appropriate. It is not required, however, that for a statute to be constitutional it must solve all the problems which may be present. As has been well stated by the Supreme Court, a legislature " 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)). Any inequalities within tax structures established by the Legislature are best examined and remedied by the Legislature rather than the courts. *Texas Co. v. Cohn*, *supra* at 385 (citing *Magnano Co. v. Hamilton*, 292 U.S. 40, 78 L. Ed. 1109, 54 S. Ct. 599 (1934)).

I would hold the taxpayer has not met its burden of proof and that the statute is constitutional. The case should be remanded to the trial court for entry of summary judgment in favor of the defendant.

UTTER and BRACHTENBACH, JJ., concur with DOLLIVER, J.

(GUY, J., did not participate in the disposition of this cause.)

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF THURSTON

No. 85-2-02383-5

ASSOCIATED GROCERS, INC., a Washington corporation,
Plaintiff,

vs.

THE STATE OF WASHINGTON,
Defendant.

MEMORANDUM OPINION

PROCEDURAL HISTORY

Associated Grocers, Inc. ("AG") filed a complaint against the State of Washington and its Department of Revenue ("State") alleging that RCW 82.04.270 is unconstitutional in that it arbitrarily discriminates against some taxpayers who pay a B&O tax on products sold at wholesale. AG seeks partial recovery of taxes paid pursuant to this statute.

Cross motions for summary judgment were filed. Argument on both motions was heard by the court on January 28, 1988. The case was taken under advisement. This memorandum opinion is the court's decision regarding the cross motions for summary judgment.

FACTS

Counsel for both parties agree that there are no material issues of fact in dispute. AG is a wholesaler of

grocery products. It supplies independently owned retail grocery stores. AG does not own or operate any retail grocery stores.

Safeway, which is an integrated business, is a competitor of AG and its independently owned and operated retail store customers. Safeway makes no sales when it distributes products from Safeway warehouses to Safeway owned retail stores; however, when it distributes products, it performs wholesaling functions similar to AG.

The taxation scheme of RCW 82.04.270 imposes a business and occupation tax (B&O tax) on businesses selling at wholesale (*e.g.*, AG) and businesses performing functions essential comparable to those performed by a wholesaler (*e.g.*, Safeway). Because of a proviso in RCW 82.04.270, Safeway does not have to pay the B&O tax when it purchases merchandise from a wholesaler who already has paid the B&O tax on the same merchandise. AG must pay the B&O tax under identical circumstances because the proviso does not apply to wholesalers. Even though it is not a party, Safeway has been used as an example by both parties to explain the tax structure applicable to AG's claim.

DECISION

AG argues that the exemption granted to businesses performing wholesale functions in RCW 82.04.270(2) violates the equal protection provision of both the Washington State Constitution and the United States Constitution. Equal protection is provided when a law provides a rational relationship between the legislative classification and a legitimate state interest, except when such classification is constitutionally suspect or results in a denial of a fundamental right. AG does not claim this exemption is constitutionally suspect or involves a fundamental right as those terms have been defined by case law. Therefore, this court examines the exemption under the "mini-

mal scrutiny test" recognizing that the legislature has a wide latitude in enacting classifications which are presumptively valid. *Simpson v. State*, 26 Wn. App. 687, 615 P.2d 1297, *review denied*, 94 Wn.2d 1022 (1980).

The test to be applied is set for in the *Simpson* case citing from *Yakima County Deputy Sheriff's Ass'n. v. Board of Comm'rs.*, 92 Wn.2d 831, 835-36, 601 P.2d 936 (1979):

> First, does the classification apply alike to all members within the designated class? . . . The answer is usually yes. . . . However, an affirmative answer to this narrow question does not itself mean that the challenged legislative classification will survive minimal scrutiny.
>
> Second, does some basis in reality exist for reasonably distinguishing between those within and without the designated class? More specifically, do reasonable grounds exist to support the classification's distinction between those within and without the class? . . . The burden is on the challenger to prove that the classification does not rest on a reasonable basis. . . .
>
> Third, does the challenged classification have any rational relation to the purposes of the challenged statute? . . . More specifically, does the difference in treatment between those within and without the designated class serve the purposes intended by the legislation? . . . The challenger must do more than merely question the wisdom and expediency of the statute. . . . The challenger must show conclusively that the classification is contrary to the legislation's purposes. . . . Moreover, it must be remembered that equal protection does not require a state to attack every aspect of a problem. Rather, the legislature is free to approach a problem piecemeal and learn from experience.

(Citations omitted)

The first step in the minimal scrutiny test is to determine whether the classification applies alike to all members. AG argues that the legislature intended to create only one class and since members of that class are treated differently, AG is denied equal protection of the laws. The State argues that the legislature intended to create two classes and that there is a rational basis to distinguish between those within and without the class granted the special exemption. Because there is a dispute concerning the classification in the statute, this court must first decide what the legislature intended: one class or two?

When there are questions of legislative intent, the primary goal of the court is to ascertain and give effect to the intention of the legislature. The intent of the legislature must be determined primarily from the language of the statute in question. The interpretation adopted should be one that best advances the legislative purpose. *Dep't. of Transportation v. SEIB*, 97 Wn.2d 454, 645 P.2d 1076 (1982). Finally, " . . . tax laws should be given a reasonable construction, without bias or prejudice against either the taxpayer or the State, in order to carry out the intention of the legislature and further the important public interest which such statutes subserve." *Estate of Hitchman*, 100 Wn.2d 464, 466, 670 P.2d 655 (1983).

As previously indicated, the intent of the legislature must be determined primarily from the language of the statute. A determination of legislative intent requires the statute to be considered as a whole:

> 82.04.270 Tax on wholesalers, distributors. (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied

by the rate of forty-four one-hundredths of one percent. (2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse of other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: Provided, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: Provided, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers; Provided further, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

After considering the statute as a whole and applying the previously discussed statutory rules of construction, I hold that the legislature intended to create one

class and to tax all members of that class as equally as possible. Since AG does not receive the benefit of the exemption, the tax does not apply alike to all members of the class in violation of the first prong of the minimal scrutiny test. It is axiomatic that if members of the same class are taxed differently, there is an obvious violation of equal protection which requires redress.

If the State's position that the legislature intended to create two classes is correct, this court would have to find that the taxes imposed on those two classes could be unequal. However, this conclusion is contradictory to the holding of the case of *Benjamin Franklin Thrift Stores v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936). In that case the Washington Supreme Court held that unequal taxation between wholesalers and those performing wholesale functions was discriminatory and illegal. Even though the *Benjamin Franklin* court did not hold explicitly that the legislature intended to create only one class of taxpayers, it is clear that that inference is the only logical one that can be drawn given the holding of the court.

However, I recognize that reasonable minds can differ and an appellate court might interpret RCW 82.04.270 in the manner that the State suggests. What follows is an analysis based on the assumption that the legislature intended to create two classes. If that assumption is true (again, I hold that it is not true), there is no dispute that the exemption applies alike to all members of the designated class of businesses performing wholesale functions. Therefore, the first prong of the test would be answered in the affirmative.

Even if the classification applies alike to all members of the class, there must still be some basis in reality for reasonably distinguishing between businesses within and without the class. The distinction between wholesalers and businesses performing wholesale functions is arguably apparent when analyzed using the applicable

principles governing the power of the legislature to impose different classifications.

The principles governing the power of state legislatures to impose classifications for tax purposes are legion. A state legislature has broad discretion in making classifications for tax purposes. Such classifications will be upheld if they are not arbitrary or capricious and are based upon some reasonable distinction. The difference between the classes need not be great. The mere fact that there is competition between business entities in different classes is not determinative. *Benjamin Franklin Thrift Stores v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936). *Texas Co. v. Cohn*, 8 Wn.2d 360, 112 P.2d 522 (1941). *Armstrong v. State*, 61 Wn.2d 116, 377 P.2d 409 (1962).

In this case the classes distinguish between businesses which are solely involved with sales at wholesale from businesses which perform wholesaling functions but do not ever sell at wholesale. AG has no retail stores. Safeway operates numerous retail stores. AG pays no B&O tax on retail sales. Safeway pays B&O tax on retail sales. In summary, there are numerous and real distinctions between AG and Safeway which arguably meet the rational basis test.

The last criterion of the minimal scrutiny test is whether the challenged classification has any rational relation to the purposes of the challenged statute. It is this criterion that is the most troublesome in determining whether the taxation scheme of RCW 82.04.270 meets the requirements of equal protection.

The legislature enacted the relevant portions of RCW 82.04.270 at different times. In 1935 the legislature enacted what is now referred to as RCW 82.04.270. The language referring to intent is as follows: ". . . the intent hereof being to impose the wholesaling tax upon persons performing functions essentially comparable to

those of a wholesaler. . . ." Laws of 1935, chap. 180, sec. 4. In 1955 the legislature amended the language of the statute to read in pertinent part as it does today: ". . . the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler. . . ." Laws of 1955, chap. 389, sec. 47. In 1959, the legislature enacted the proviso which is the basis for AG's claim: "Provided, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles." Laws of 1959, Ex. Sess., chap. 5, sec. 8.

The obvious intent of the legislature in RCW 82.04.270 as amended is to tax businesses performing wholesale functions (*e.g.*, Safeway) equally with businesses making sales at wholesale (*e.g.*, AG). This is the only logical conclusion because of the clear statement of legislative intent in the statute. This conclusion is also supported by the legislative mandate to prescribe "uniform and equitable rules" to tax on the same dollar value whether that dollar amount is sales at wholesale or is the value of articles distributed by businesses where the wholesale functions have been integrated into their organization. RCW 82.04.270.

This court's conclusion that the legislature intended to impose equal taxes is supported by the rulings of the Supreme Court of the State of Washington. In the case of *Foremost Dairies v. State Tax Comm'n.*, 75 Wn.2d 758, 761, 453 P.2d 870 (1969) the court commented on the intent of legislature:

> It was the obvious intent of the legislature to tax as a "wholesaling function" the horizonal merchandising scheme which competes with and, except for change of title to goods, is essentially similar to the

> typical vertical division of merchandising whereby goods are sold by manufacturers/processors to a jobber/wholesaler and on to the retailer for sale to the ultimate consumer.

The court in the case of *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 326, 474 P.2d 261 (1970) likewise found the same legislative intent:

> The purpose of RCW 82.04.270(2) is to neutralize the tax advantage of a horizontal merchandising scheme used to eliminate the normal vertical wholesaling functions.

From the language of the statute itself and from the opinions of the appellate courts of this state construing this statute, it is absolutely clear that the purpose of the statute is to tax the two classes equally to neutralize any tax advantage inherent in organizations which have integrated the wholesaling functions into their operation.

The issue that remains is whether the legislature by enacting the exemption applicable only to businesses performing wholesale functions has violated the clear legislative purpose and has denied wholesalers equal protection of the laws.

In *Simpson v. State*, *supra*, the court held that the denial of a tax exemption was a denial of equal protection. The court reached this conclusion because it failed to find a "rational relationship" between the discrimination and the enunciated legislative purpose of equalizing the tax burden for all citizens.

In this case I find that there is no rational relationship between the obvious discrimination against wholesalers and the explicit statement of legislative purpose of equalizing taxes. Such discrimination is clearly contrary to the legislative purpose and appears to be the result of legislative oversight. This discrimination is a violation of equal protection of laws guaranteed by both the Wash-

ington State Constitution and the United States Constitution.

REMEDY

Since this court has declared that the exemption as it is applied is a denial of equal protection of the laws, a choice must be made as to whether the exemption should be declared void or extended to wholesalers. The court in *Simpson v. State*, *supra*, faced a similar issue. In that case the court found that extending the exemption to the class which suffered discrimination would allow plaintiffs to obtain a remedy and would be consistent with the legislative purpose.

In this case the State argues that if the exemption is declared unconstitutional, the appropriate remedy is to declare it void and remove the exemption for businesses like Safeway. AG argues that this result would deny them the back taxes that they have paid.

I hold that extending the exemption to wholesalers meets the test enunciated in the *Simpson* case. It provides a remedy to AG because it allows AG to receive a refund to the extent that it can prove tax payments made and to the extent any statute of limitations controls. It also meets the clear legislative purpose of equalizing the B&O tax. Also, the legislature obviously intended to allow businesses performing wholesale functions an exemption when the B&O tax had already been paid by the supplier. If it were declared void, then Safeway and other businesses performing wholesale functions would lose the exemption and might be liable for additional taxes. In this case the remedy most consistent with the legislative purpose of RCW 82.04.270 is to extend the exemption to wholesalers.

CONCLUSION

The exemption of RCW 82.04.270 as it presently is applied denies wholesalers equal protection of the law.

The appropriate remedy is to require the State to allow AG to use the exemption and allow AG to claim a refund for taxes paid in excess of what would have been required had the exemption applied to AG. AG's motion for summary judgment is granted and the State's motion for summary judgment is denied. I will sign appropriate orders upon presentation.

Dated this 25th day of February, 1988, at Olympia, Washington.

/s/ Daniel J. Berschauer
DANIEL J. BERSCHAUER, Judge

APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

No. 85-2-02383-5

ASSOCIATED GROCERS, INC.,
a Washington corporation,
Plaintiff,

vs.

THE STATE OF WASHINGTON,
Defendant.

PARTIAL SUMMARY JUDGMENT FOR
PLAINTIFF ASSOCIATED GROCERS, INC.

This matter having come on duly and regularly for hearing before the undersigned Judge of the above-entitled court on the motion of plaintiff Associated Grocers, Inc. for summary judgment and the cross-motion for summary judgment of the defendant State of Washington, and the parties agreeing that there are no genuine issues of material fact and the court having heard the argument of counsel and reviewed the records and files herein, including but not limited to Associated Grocers, Inc. Motion for Summary Judgment, Memorandum of Associated Grocers in Support of Motion for Summary Judgment, and Affidavit of Dennis Stalder; defendant State of Washington Department of Revenue's Cross-Motion for Summary Judgment and Memorandum in Support of Defendant State of Washington's Cross-Motion for Summary Judgment and in Response to [Plaintiff's] Motion for Summary Judgment; State of Washington

Department of Revenue Motion for Reconsideration; and Memorandum of Associated Grocers, Inc. in Opposition to Motion for Reconsideration; and the court being otherwise fully advised in the premises and having issued its Memorandum Opinion herein on February 25, 1988, which Memorandum Opinion of this Court is by this reference incorporated herein as though fully set forth, it is hereby

ORDERED, ADJUDGED AND DECREED that RCW 82.04.270, as applied to Associated Grocers, Inc., violates the equal protection provision of both the Washington State Constitution and the United States Constitution to the extent it grants an exemption from the wholesale business and occupation tax to persons who perform wholesaling functions and denies that same exemption to Associated Grocers, Inc., a wholesaler, and it is further

ORDERED, ADJUDGED AND DECREED that to the extent Associated Grocers, Inc. can show by proper invoice or other competent evidence purchases of property from a wholesaler who has paid a business and occupation tax to the State of Washington on the same articles, Associated Grocers, Inc. is exempt from payment of a wholesale business and occupation tax on those articles in accordance with the exemption granted in RCW 82.04.270 to persons who perform wholesaling functions, provided that said exemption shall not apply to purchases by Associated Grocers, Inc. from manufacturers as defined in RCW 82.01.110, and further provided that the wholesaling business and occupation tax may not be assessed twice to Associated Grocers, Inc. for the same article, and it is further

ORDERED, ADJUDGED AND DECREED that Associated Grocers, Inc. shall be allowed a refund to the extent permitted under the applicable statute of limitations and to the extent Associated Grocers, Inc. has paid wholesale business and occupation taxes to the State of Washing-

ton in excess of what would have been required had the aforesaid exemption and provisos applied to Associated Grocers, Inc., and it is further

ORDERED, ADJUDGED AND DECREED that the cross-motion for summary judgment of the defendant State of Washington, Department of Revenue is hereby denied.

DATED this 29th day of March, 1988.

/s/ DJB
DANIEL J. BERSCHAUER, Judge

PRESENTED BY:

BETTS, PATTERSON & MINES, P.S.

By /s/ Paul D. Carey
PAUL D. CAREY

By /s/ Livingston Wernecke
LIVINGSTON WERNECKE
Of Attorneys for Associated
Grocers, Inc.

Approved as to form

/s/ Mary E. Fairhurst
Assistant Attorney General

APPENDIX D

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

No. 85-2-02383-5

ASSOCIATED GROCERS, INC.,
a Washington corporation,
Plaintiff,

vs.

THE STATE OF WASHINGTON,
Defendant.

JUDGMENT FOR PLAINTIFF
ASSOCIATED GROCERS, INC.
ON REFUND AMOUNT

I.

HEARING

1.1 *Date.* October 11, 1988.

1.2 *Notice of Hearing.* Hearing was upon proper notice.

1.3 *Appearance.* Paul D. Carey and Livingston Wernecke of Betts, Patterson & Mines, P.S. for the plaintiffs, and Kenneth O. Eikenberry, Attorney General, and Mary E. Fairhurst, Assistant Attorney General, for the defendant.

1.4 *Purpose.* To present Stipulation of Facts and to enter judgment for plaintiff Associated Grocers, Inc. on refund amount, it being agreed by the parties that there are no genuine issues of material fact.

1.5 *Record Before The Court.* The record before the Court consists of the following documents:

(a) Plaintiffs Complaint and Notice of Appeal.

(b) Plaintiff's Motion for Summary Judgment.

(c) Memorandum of Associated Grocers in Support of Motion for Summary Judgment and Affidavit of Dennis Stalder.

(d) Defendant State of Washington's Cross-Motion for Summary Judgment.

(e) Memorandum in Support of Defendant State of Washington's Cross-Motion for Summary Judgment and in Response to AG's Motion for Summary Judgment.

(f) Memorandum of Plaintiff Associated Grocers in Response to State of Washington Cross-Motion for Summary Judgment and Brief in Opposition to Plaintiff's Summary Judgment Motion.

(g) Memorandum Opinion dated February 25, 1988.

(h) Defendant State of Washington's Motion for Reconsideration.

(i) Memorandum of Associated Grocers in Opposition to Motion for Reconsideration.

(j) Reporter's Transcript of Proceedings on March 29, 1988.

(k) Order denying Defendant's Motion for Reconsideration.

(l) Partial Summary Judgment for Plaintiff Associated Grocers, Inc. (dated March 29, 1988).

(m) Stipulation of Facts.

II.

FINDINGS

The Court, having considered the record before it finds:

2.1 *No Issue of Fact.* There is no genuine issue as to any any material fact in this case.

2.2 *Judgment.* The plaintiff, Associated Grocers, Inc. is entitled to judgment as a matter of law against the State of Washington in the amount of $9,938,529.00, plus interest pursuant to RCW 82.32.060.

III.

ORDER AND JUDGMENT

On the basis of the foregoing Findings and in accordance with the Court's Memorandum Opinion dated February 25, 1988, and the Court's Partial Summary Judgment dated March 29, 1988 and the Stipulation of Facts, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Associated Grocers, Inc. and against the State of Washington in the amount of $9,938,529.00, plus interest thereon pursuant to RCW 82.32.060.

DONE IN OPEN COURT this 11 day of October, 1988.

/s/ Daniel J. Berschauer
DANIEL J. BERSCHAUER
Superior Court Judge

PRESENTED BY:

BETTS, PATTERSON & MINES, P.S.

By /s/ Paul D. Carey
PAUL D. CAREY

By /s/ Livingston Wernecke
LIVINGSTON WERNECKE
Attorneys for Plaintiff
Associated Grocers, Inc.

Approved as to Form, Notice of
Presentation Waived:

KENNETH *O.* EIKENBERRY
Attorney General
State of Washington

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

By /s/ Mary E. Fairhurst
MARY E. FAIRHURST
Assistant Attorney General
Attorney for Defendant

JUDGMENT SUMMARY

Judgment Creditor: Associated Grocers, Inc.

Attorneys for Judgement Creditor: BETTS, PATTERSON & MINES, P.S.

Judgment Debtor: State of Washington, Department of Revenue

Amount of Judgment: $9,938,529.00, with interest pursuant to RCW 82.32.060

Taxable Costs and Attorney's Fees NOT REQUESTED —DJB

APPENDIX E

THE SUPREME COURT OF WASHINGTON

No. 55686-5

ASSOCIATED GROCERS, INC.,
Respondent,

v.

THE STATE OF WASHINGTON,
Appellant.

ORDER DENYING MOTIONS FOR RECONSIDERATION

[Filed May 17, 1990]

The Court having decided by majority vote that the appellant's and the respondent's respective motions for reconsideration should be denied,

It is ordered that the motions be and they hereby are denied.

Dated this 17th day of May, 1990.

/s/ Keith M. Callow
Chief Justice

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APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Constitution of the State of Washington, Article I:

Section 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

* * * *

Revised Code of Washington:

82.03.010 Board created. There is hereby created the board of tax appeals of the state of Washington as an agency of state government.

82.03.130 Appeals to board—Jurisdiction as to types of appeals. The board shall have jurisdiction to decide the following types of appeals:

(1) Appeals taken pursuant to RCW 82.03.190.

* * *

82.03.180 Judicial Review. Judicial review of a decision of the board of tax appeals shall be de novo in accordance with the provisions of RCW 82.32.180 or 84.68.020 as applicable except when the decision has been

rendered pursuant to a formal hearing elected under RCW 82.03.140 or 82.03.190, in which event judicial review may be obtained only pursuant to RCW 34.05.510 through 34.05.598: *Provided, however*, That nothing herein shall be construed to modify the rights of a taxpayer conferred by RCW 82.32.180 and 84.68.020 to sue for tax refunds: *And provided further*, That no review from a decision made pursuant to RCW 82.03.130(1) may be obtained by a taxpayer unless within the petition period provided by RCW 34.05.542 the taxpayer shall have first paid in full the contested tax, together with all penalties and interest thereon, if any. The director of revenue shall have the same right of review from a decision made pursuant to RCW 82.03.130(1) as does a taxpayer; and the director of revenue and all parties to an appeal under RCW 82.03.130(5) shall have the right of review from a decision made pursuant to RCW 82.03.130(5).

82.03.190 Appeal to board from denial of petition or notice of determination as to reduction or refund—Procedure. Any person having received notice of a denial of a petition or a notice of determination made under RCW 82.32.160, 82.32.170, 82.34.110, or 82.49.060 may appeal, within thirty days after the mailing of the notice of such denial or determination, to the board of tax appeals. In the notice of appeal the taxpayer shall set forth the amount of the tax which the taxpayer contends should be reduced or refunded and the reasons for such reduction or refund, in accordance with rules of practice and procedure prescribed by the board. A copy of the notice of appeal shall be provided to the department within the time specified in the rules of practice and procedure prescribed by the board. However, if the notice of appeal relates to an application made to the department under chapter 82.34 RCW, the taxpayer shall set forth the amount to which the taxpayer claims the credit or exemption should apply, and the grounds for such contention, in accordance with rules of practice and procedure prescribed by the board. If the taxpayer in-

tends that the hearing before the board be held pursuant to the administrative procedure act (chapter 34.05 RCW), the notice of appeal shall also so state. In the event that the notice of appeal does not so state, the department may, within thirty days from the date of its receipt of the notice of appeal, file with the board notice of its intention that the hearing be held pursuant to the administrative procedure act.

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.270 Tax on wholesalers, distributors. (1) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided*, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of

such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further*, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

82.32.050 Deficient and delinquent payments—Penalties and interest—Limitations. If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within thirty days from the date of the notice, or within such further time as the department may provide. If payment is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of fifty percent of the additional tax found to be due shall be added.

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter, (2) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (3) where a taxpayer has executed a written waiver of such limitation.

82.32.060 Excess payment—Credit or refund—Payment of judgments for refund. If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period of assessment of taxes prescribed by RCW 82.32.050 a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

. . .

Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide.

Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in like manner, upon the filing with the department of a certified copy of the order or judgment of the court. Except as to the credits in computing tax authorized by RCW 82.04.435, interest at the rate of three percent per annum shall be allowed by the department and by any

court on the amount of any refund or recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer.

82.32.090 Late payment—Penalties. If payment of any tax due is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. No penalty so added shall be less than two dollars.

If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than five dollars.

Notwithstanding the foregoing, the aggregate of penalties imposed under this chapter for failure to file a return, late payment of any tax, increase, or penalty, or issuance of a warrant shall not exceed twenty-five percent of the tax due, or seven dollars, whichever is greater.

82.32.150 Contest of tax—Prepayment required—Restraining orders and injunctions barred. All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

82.32.160 Correction of tax—Administrative procedure—Conference—Determination by department. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the

department, may within thirty days after the issuance of the origianl notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claimed for exemption or credit.

82.32.180 Court appeal—Procedure. Any person . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason

why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county. Within ten days after filing the notice of appeal, the taxpayer shall file with the clerk of the superior court a good and sufficient surety bond payable to the state in the sum of two hundred dollars, conditioned to diligently prosecute the appeal and pay the state all costs that may be awarded if the appeal of the taxpayer is not sustained.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected.

82.32.190 Stay of collection pending suit. The department, by its order, may hold in abeyance the collection of tax from any taxpayer or any group of taxpayers when a question bearing on their liability for tax hereunder is pending before the courts: *Provided*, That the department may impose such conditions as may be deemed just and equitable and shall require the payment of interest at the rate of three-quarters of one percent of the amount of the tax for each thirty days or portion thereof from the date upon which such tax became due.

82.32.200 Stay of collection—Bond. When any assessment or additional assessment has been made, the taxpayer may obtain a stay of collection, under such circumstances and for such periods as the department of revenue may be general regulation provide, of the whole or any part thereof, by filing with the department a bond in an amount, not exceeding twice the amount on which stay is desired, and with sureties as the department deems necessary, conditioned for the payment of the amount of the assessments, collection of which is stayed by the bond, together with the interest thereon at the rate of one percent of the amount of such asessment for each thirty days or portion thereof from the due date thereof until paid.

82.32.210 Tax warrant—Filing—Lien—Effect. If any fee, tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant under its official seal in the amount of such unpaid sums, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which fees, taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the fee, tax or penalty to be im-

mediately due and payable and may issue a warrant immediately.

The department shall file a copy of the warrant with the clerk of the superior court of any county of the state in which real and/or personal property of the taxpayer may be found. Upon filing, the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the fee, tax or portion thereof and any increases and penalties for which the warrant is issued and the date when the copy is filed, and thereupon the amount of the warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom the warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of the personal property in any way affects the lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when the third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: *Provided, however,* That the phrase "bona fide interests of third persons" does not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed the chattel or real property mortgage or the document evidencing the credit transaction. The amount of the warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of the clerk. The warrant so docketed shall be sufficient to support the issuance of writs of

garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied.

82.32.215 Revocation of certificate of registration. If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer is delinquent, for three consecutive reporting periods, in the transmission to the department of revenue of retail sales tax collected by him, the department of revenue may, by order issued under its official seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if the order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered, and until the taxpayer has deposited with the department of revenue such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the department of revenue may require, but the amount of the security shall not be greater than one-half the estimated average annual liability of the taxpayer.

82.32.220 Execution of warrant—Levy upon property—Satisfaction. The department of revenue may issue an order of execution, pursuant to a filed warrant, under its official seal directed to the sheriff of the county in which the warrant has been filed, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of the warrant, plus the cost of executing the warrant, and

return the warrant to the department of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. The sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court.

The sheriff shall be entitled to fees as provided by law for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final amount due is received, together with interest, penalties, and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer or to any lien holder entitled thereto. If the return on the warrant shows that the same has not been satisfied in full, the amount of the deficiency shall remain the same as a judgment against the taxpayer which may be collected in the same manner as the original amount of the warrant.

APPENDIX G

WASHINGTON RULES OF APPELLATE PROCEDURE

Rule 12.6 Stay of Mandate Pending Decision on Application for Review by United States Supreme Court

The appellate court will not stay issuance of the mandate for the length of time necessary to secure a decision by the United States Supreme Court on an application for review, except in a case in which the penalty of death has been imposed.

Rule 12.9 Recall of Mandate

(a) To Require Compliance with Decision. The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate.

(b) To Correct Error. The appellate court may recall a mandate issued by it to correct an inadvertent mistake, to modify a decision obtained by fraud of a party or counsel in the appellate court, or to modify a decision of the appellate court which was beyond the jurisdiction of the court.

(c) Time for Motion. The motion to recall the mandate must be made within a reasonable time.

Supreme Court, U.S.
FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-281

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General
State of Washington

LELAND T. JOHNSON*
Assistant Attorney General
Attorneys for Respondent
**Counsel of Record*

7th Floor, Highways-Licenses Building
Mail Stop PB-71
Olympia, Washington 98504
(206) 753-5528

QUESTIONS PRESENTED

I. Does this Court have certiorari jurisdiction under 28 U.S.C. § 1257 to determine whether the Washington Supreme Court "deprived [petitioner] of its rights under the Due Process Clause of the Fourteenth Amendment," where petitioner failed to properly raise this procedural due process issue at any point during the proceedings below and where the Washington Supreme Court did not address this due process issue?

II. Does this Court have certiorari jurisdiction under 28 U.S.C. § 1257 to determine whether the Due Process Clause of the Fourteenth Amendment mandates some form of retrospective relief to petitioner, where the Washington Supreme Court concluded that its equal protection holding should apply prospectively only as to all taxpayers (including petitioner) and where petitioner has presented no substantial federal question relating to the Washington court's prospective application of its equal protection holding?

III. Should the portion of the judgment below that denied petitioner any form of retrospective relief be deemed correct because the Washington Supreme Court erroneously concluded that the partial tax exemption in question violated the Equal Protection Clause of the Fourteenth Amendment?

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No. 90-281

IN THE
SUPREME COURT
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UNITED STATES

OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent concurs in petitioner's statement of the grounds on which the jurisdiction of this Court is invoked, except that respondent believes this Court may lack jurisdiction to review the Washington Supreme Court's judgment by writ of certiorari under 28 U.S.C. § 1257 for the reasons presented herein.

STATEMENT OF THE CASE

Washington imposes business and occupation (B&O) tax on the activities of making wholesale or retail sales. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. A wholesale sale is a sale for resale either to another wholesaler or to a retailer. Wash. Rev. Code 82.04.060. A retail sale is a sale to a consumer, i.e., a sale not for resale. Wash. Rev. Code § 82.04.050.

Both wholesale and retail B&O taxes are measured by the gross proceeds of sales. The basic rate of both taxes is .0044. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. Thus, the wholesale B&O tax on a sale of $1,000 is $4.40. The retail B&O tax on a sale of $1,000 also is $4.40.

At various times, including the present, Washington has imposed an additional B&O tax on internal distributions by retailers with two or more retail outlets. Wash. Rev. Code § 82.04.270(2). An internal distribution is not a sale. It occurs when a retail business distributes merchandise from its own warehouse to one of its retail outlets. The measure of this additional tax is the value of the articles distributed. The basic rate is .0044. *Id.* Thus, if a retailer distributes goods valued at $1,000 from its warehouse to its retail outlet, the additional internal distribution tax is $4.40. This tax is imposed in addition to the retail B&O tax paid by the same business when it sells the goods to a consumer.

Washington relieves the retailer of the additional B&O tax on internal distributions if the retailer purchases the goods from a wholesaler that has paid the wholesale B&O tax on the same goods. Wash. Rev. Code § 82.04.270(2). However, this partial exemption does not apply to the tax imposed on the retail sale of the goods. The retailer is always subject to the retail B&O tax.

Wholesalers are not subject to the B&O tax on internal distributions. Thus, they cannot claim the partial exemption that relieves the additional tax on some internal distributions. Just as the retailer is subject to the retail B&O tax on all sales, the wholesaler is subject to the wholesale B&O tax on all sales.

The pertinent provisions of Wash. Rev. Code § 82.04.270 have not changed in substance since 1959, when the Washington Legislature added the partial exemption to subsection (2). From 1959 until the end of 1985, petitioner Associated Grocers voluntarily paid wholesale B&O taxes under the statute on all sales without protest. During this period, neither Associated Grocers nor any other wholesaler

challenged the constitutionality of the partial exemption for certain internal distributions.

On December 31, 1985, Associated Grocers filed this action for a partial refund of wholesale B&O taxes paid since January 1, 1981. Associated Grocers alleged that it was entitled to this refund because the partial exemption in Wash. Rev. Code § 82.04.270(2) for internal distributions is unconstitutionally discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment and the equivalent provision of the Washington State Constitution.

On August 12, 1987, Associated Grocers brought a motion for summary judgment in this action. The State of Washington brought a cross-motion for summary judgment. The trial court entered a partial summary judgment for Associated Grocers on March 29, 1988. The trial court concluded that the partial exemption in Wash. Rev. Code § 82.04.270(2) violates the equal protection provisions of the federal and state constitutions. The trial court further concluded that the remedy most consistent with legislative intent was to extend the partial exemption to wholesalers like Associated Grocers rather than to declare the partial exemption void (Pet. 27a-28a). On October 11, 1988, consistent with those conclusions, the trial court entered a refund judgment for Associated Grocers in the amount of $9,938,529 plus interest (Pet. 34a-35a).[1]

On appeal, the Washington Supreme Court affirmed in part and reversed in part the trial court's judgment. The Washington Supreme Court agreed with the trial court that the partial exemption is unconstitutional because "all members of a designated class must be treated equally under the statute." *Associated Grocers, Inc. v. State*, 114 Wash. 2d 182, 184, 787 P.2d 22, 23 (1990) (Pet. 2a). The Washington Supreme Court held, however, that the trial court's retrospective extension of the partial exemption to wholesalers was

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[1] Associated Grocers inaccurately states that the trial court "extended the partial exemption prospectively to Associated Grocers" (Pet. 6). The trial court's judgment granted no prospective relief to Associated Grocers (Pet. 32a-35a).

an inappropriate remedy. The supreme court held that the appropriate remedy under state law was to strike the unconstitutional exemption and, therefore, the court reversed the refund the trial court had granted to Associated Grocers. *Associated Grocers*, 114 Wash. 2d at 184, 189-90, 787 P.2d at 23, 26-27 (Pet. 2a, 7a-9a).[2]

After holding that Associated Grocers was not entitled under state law to a refund of taxes paid pursuant to Wash. Rev. Code § 82.04.270(1), the Washington Supreme Court addressed whether its decision in this case should be applied prospectively only. The court recognized that if its equal protection holding applied retrospectively, retailers who had received the benefits of an invalid partial exemption for 30 years arguably "should now be assessed for taxes they should have paid" as a matter of state law. *Associated Grocers*, 114 Wash. 2d at 190, 787 P.2d at 27 (Pet. 9a).[3] Because "all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of [its] decision in this case", the court applied its holding prospectively only. 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a). The court struck the partial exemption from Wash. Rev. Code § 82.04.270(2) effective April 1, 1990, thirty days after the

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[2]Associated Grocers inaccurately states that the supreme court "disregarded" Wash. Rev. Code § 82.32.060, which provides for a refund of a tax paid "in excess of that properly due" (Pet. 7 n.6). The court specifically addressed whether this statute entitled Associated Grocers to a refund. The court held that Associated Grocers had paid no wholesale B&O taxes "in excess of that properly due" because the wholesale tax imposed by Wash. Rev. Code § 82.04.270(1) is not unconstitutional and because the appropriate remedy under state law is to strike rather than to extend the partial exemption in Wash. Rev. Code § 82.04.270(2) that the court concluded is unconstitutional. Whether Wash. Rev. Code § 82.32.060 mandates a refund in such circumstances is strictly a question of state law. "[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

[3]Associated Grocers states that the court "noted the argument" that retailers should be assessed retroactively for unpaid taxes (Pet. 7). This Court should be aware that neither before nor after the Washington Supreme Court's decision did Associated Grocers ever seek such a remedy from the courts below. Instead, Associated Grocers consistently argued that a refund and other monetary relief to *it* was the *only* appropriate remedy in this case.

court's decision. 114 Wash. 2d at 191, 787 P.2d at 27 (Pet. 9a).

Both parties filed timely motions for reconsideration in the Washington Supreme Court. The State of Washington's reconsideration motion argued that the court's equal protection holding was inconsistent with controlling United States Supreme Court precedents and with the Washington court's own precedents. The State urged the court to uphold the constitutionality of the partial exemption. Associated Grocers' reconsideration motion was limited to whether it should receive a partial exemption from wholesale B&O taxes for the period from January 1, 1981, through March 31, 1990.[4]

Most of Associated Grocers' reconsideration motion was devoted to its contentions that prospectively severing the partial exemption was "an incomplete and therefore inappropriate remedy" as a matter of state law and that the court's denial of a tax refund to Associated Grocers was inconsistent with the goal of fashioning appropriate equitable relief recognized by the court in *Bond v. Burrows*, 103 Wash. 2d 153, 690 P.2d 1168 (1984) (App. 4a-10a).

Associated Grocers also argued briefly that federal constitutional law mandates that it receive retrospective monetary relief.[5] Contrary to the representation in Associated Grocers' petition, however, this was *not* a *due process*

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[4]Associated Grocers specifically disclaimed any request that the court reconsider its decision to sever the partial exemption prospectively for the period after March 31, 1990 (App. 2a).

[5]Rule 14.1(h) requires the statement of the case in a petition for a writ of certiorari to specify the stage in the proceedings at which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the state courts, and such pertinent quotation of specific portions of the record or summary thereof (with specific reference to the places in the record where the matter appears) as will show that the federal question was timely and properly raised. Associated Grocers' statement of the case fails to comply with this rule because Associated Grocers cannot quote any portion of the record to show that the federal question presented in its petition was timely and properly raised in the state courts. Respondent has reproduced as an Appendix the motion for reconsideration filed by Associated Grocers in the Washington Supreme Court to assist this Court in determining whether it has jurisdiction to review the state court's judgment on a writ of certiorari.

argument. Instead, Associated Grocers contended that the Washington Supreme Court's decision violates its rights under the *Equal Protection Clause* of the Fourteenth Amendment.[6]

ARGUMENT

I. THIS COURT PROBABLY LACKS JURISDICTION TO REVIEW THE WASHINGTON SUPREME COURT'S JUDGMENT BECAUSE ASSOCIATED GROCERS FAILED TO PROPERLY RAISE AT ANY POINT IN THE PROCEEDINGS BELOW THE PROCEDURAL DUE PROCESS ISSUE PRESENTED IN ITS PETITION FOR WRIT OF CERTIORARI AND THE WASHINGTON SUPREME COURT DID NOT ADDRESS THIS DUE PROCESS ISSUE.

For the first time on appeal to this court, and in an attempt to equate this case with *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Associated Grocers now urges that the Due Process Clause requires that it be afforded "meaningful retrospective relief" in this case. (Pet. 8-9, 12, 14).

The trial court granted Associated Grocers retrospective relief in the form of a refund "pursuant to RCW 82.32.060" because, in the trial court's view, "the remedy most consistent with the legislative purpose of RCW 82.04.270 is to extend the exemption to wholesalers." (Pet. 27a, 34a). Thus, the trial court rested its remedial holding exclusively on state law. The trial court did not consider or

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[6]Associated Grocers accurately states that it cited *Carpenter v. Shaw*, 280 U.S. 363 (1930), *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), and *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), in its reconsideration motion to the Washington Supreme Court and that this Court later relied on these cases in support of its procedural due process holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990). Associated Grocers cited these three cases, however, only in support of its contention that "to deny [it] relief during the interim period and the refund ordered by the trial court would be to deny [it] equal protection under federal constitutional law." (App. 10a). Associated Grocers' reconsideration motion contains not a single reference to "due process." (App. 1a-12a).

determine the due process issue now raised by Associated Grocers because no such argument was presented to it.

The Washington Supreme Court concluded that the trial court erred in granting retrospective relief to Associated Grocers. Like the trial court, however, the supreme court based this remedial holding exclusively on state law. The supreme court held that the appropriate remedy under state law was to sever the exemption rather than to extend it to wholesalers. *Associated Grocers*, 114 Wash. 2d at 184, 189-90, 787 P.2d at 23, 26-27 (Pet. 2a, 7a-9a). The supreme court's opinion did not pass on the due process issue now raised by Associated Grocers.[7] Again, this was because no such argument was presented to it.

The Washington Supreme Court's summary order denying motions for reconsideration similarly gives no indication that the court considered or determined this due process issue. (Pet. 36a). Neither party's motion for reconsideration presented this issue to the court. Associated Grocers did argue briefly in its motion that the supreme court's disposition of the case denied Associated Grocers "equal protection under federal constitutional law." (App. 10a). However, the reconsideration motion contained no due process argument.

Under 28 U.S.C. § 1257, final judgments rendered by the highest court of a state may be reviewed by the Court by writ of certiorari where a federal title, right, privilege, or immunity has been "specifically set up or claimed." Under the Court's interpretation of this statute, the Court generally will not review federal claims that were not "pressed or passed upon" in the state court. *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988); *Bankers Life & Casualty Co. v. Crenshaw*,

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[7]The court began its discussion of prospectivity with the following statement: "Arguably distributors, who have benefited for 30 years from an invalid exemption, should now be assessed for taxes they should have paid." *Associated Grocers*, 114 Wash. 2d at 190, 787 P.2d at 27 (Pet. 9a). This was nothing more than the court's statement of the obvious effect under state law of applying the court's decision retrospectively. There is no indication in this sentence that the court considered or determined whether the Due Process Clause required it to grant some form of retrospective relief to Associated Grocers.

486 U.S. 71, 75-80 (1988); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983).

Therefore, the Court probably lacks jurisdiction to review the Washington Supreme Court's judgment because the only question presented in Associated Grocers' petition was neither properly raised nor decided below.

II. THIS COURT PROBABLY LACKS JURISDICTION TO REVIEW THE WASHINGTON SUPREME COURT'S JUDGMENT BECAUSE ASSOCIATED GROCERS' PETITION FOR CERTIORARI PRESENTS NO SUBSTANTIAL FEDERAL QUESTION RELATING TO THE WASHINGTON COURT'S PROSPECTIVE APPLICATION OF ITS UNDERLYING EQUAL PROTECTION HOLDING.

After holding that the partial exemption in Wash. Rev. Code § 82.04.270(2) is unconstitutional and after holding that the appropriate remedy under state law is to strike the unconstitutional exemption rather than extend it the Washington Supreme Court held that its entire decision would apply prospectively only. The court did this because "all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of [the court's] decision in this case." *Associated Grocers,* 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a). The court applied its decision uniformly to all taxpayers (including Associated Grocers) effective April 1, 1990, thirty days after the court's decision. 114 Wash. 2d at 191, 787 P.2d at 27 (Pet. 9a).

The effect of the Washington Supreme Court's prospectivity holding is to declare that the partial exemption in Wash. Rev. Code 82.04.270(2) was constitutional and valid during all periods prior to April 1, 1990. *Cf. American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2333 (1990) (under the third prong of the *Chevron Oil* test, "the question is not whether equitable considerations outweigh the obligation to provide relief for a constitutional violation, but

whether there is a constitutional violation in the first place"). Since the exemption statute was valid until April 1, 1990, neither state law nor federal law entitles Associated Grocers to any retrospective relief whatsoever. Unless this Court declares the Washington court's prospectivity holding in conflict with federal law, the judgment below precludes the State of Washington -- for all tax periods prior to April 1, 1990 -- from refunding wholesale B&O taxes to Associated Grocers or other wholesalers *and* from collecting additional B&O taxes from retailers on their internal distributions.

In arguing that the Due Process Clause requires that it "be afforded meaningful retrospective relief," Associated Grocers necessarily *assumes* that the Washington court's underlying equal protection holding applies retrospectively. The Washington court held directly to the contrary, however, and Associated Grocers' petition presents no satisfactory explanation why any controlling federal law prohibits the Washington court from so holding.[8]

Associated Grocers contends that this case, like *McKesson*, "does not involve any issue" as to whether the Washington Supreme Court's underlying equal protection decision should be applied prospectively or retrospectively because it "rested on well-established principles of Equal Protection Clause jurisprudence." (Pet. 9 n.7). To the contrary, this case bears no resemblance at all to *McKesson*.

Because this case does not involve the application of settled law, the due process reasoning in *McKesson* is inapplicable here. The issue before the Court in *McKesson* was whether Florida could give prospective relief only to a taxpayer that had paid taxes under a Florida statute enacted shortly *after* the Court's decision in *Bacchus Im-*

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[8]It is well-settled that neither the Due Process Clause nor the Equal Protection Clause prohibits the application of decisions prospectively only. *See American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2342 (1990); *Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Williams v. United States*, 401 U.S. 646, 651 (1971); *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

ports, Ltd. v. Dias, 468 U.S. 263 (1984), and where *Bacchus* clearly foreclosed any argument that the statute was constitutional. Because the Florida Supreme Court's decision invalidating the post-*Bacchus* statute involved "only the application of settled Commerce Clause precedent," the Court examined Florida's obligation to provide relief under the Due Process Clause. *American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2332 (1990). The Court concluded that Florida had a constitutional duty to provide retrospective relief to McKesson because the taxes at issue were paid under a statute that violated settled constitutional law when enacted and enforced and because the taxes were paid under duress. In reaching this conclusion, the Court found that Florida could "hardly claim surprise at the Florida courts' invalidation" of the post-*Bacchus* statute because it was essentially identical to the Hawaii statute invalidated in *Bacchus*. *McKesson*, 110 S. Ct. at 2255; *see id.* at 2257 ("[T]he State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise[.]").

In contrast, the Washington courts' underlying equal protection holdings in this case were completely unanticipated because they conflicted with settled constitutional law. As the three dissenting justices in *Associated Grocers* recognized, the Washington Supreme Court majority ignored controlling United States Supreme Court precedents and the Washington court's own precedents in declaring the partial exemption in Wash. Rev. Code § 82.04.270(2) unconstitutional. *Associated Grocers*, 114 Wash. 2d at 191-97, 787 P.2d at 27-30 (Dolliver, J., dissenting) (Pet. 10a-17a).[9] From

[9]The dissenting justices also recognized that the majority's citation of *Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 60 P.23 86 (1936) and *Air-Mac, Inc. v. State*, 78 Wash. 2d 319, 474 P.2d 261 (1970) for the proposition that "[t]his court has consistently treated distributors and wholesalers as members of a single class under the statute and its forerunners" is an inacurrate reading of those cases and provides no support for the majority's equal protection holding. 114 Wash. 2d at 194, 787 P.2d at 29 (Dolliver, J., dissenting) (Pet. 13a-14a). In *Benjamin Franklin*, the court rejected an equal protection challenge to the

1959 (when the Legislature enacted the partial exemption) until the end of 1985 (when Associated Grocers filed this action), neither Associated Grocers nor any other wholesaler challenged the constitutionality of the partial exemption. Even the Washington Supreme Court majority acknowledged: "[A]ll parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of our decision in this case." *Associated Grocers*, 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a).

The Washington court applied its equal protection holding prospectively only precisely because the decision could not be anticipated by anyone.[10] In accordance with the Washington court's prospectivity holding, none of the taxes in question were collected under an unconstitutional statute. Under such circumstances, the *McKesson* due process analysis has no application.

The only question presented in Associated Grocers' petition for certiorari relating to the Washington court's prospective application of its equal protection holding is whether such prospective application violates the Due Process Clause. Because it has long been settled that the Due Process Clause "has no voice upon the subject" of prospective application, *Great Northern Ry. v. Sunburst Oil & Re-*

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differing tax treatment in the statute between owners of one retail store and owners of two or more retail stores. The court's holding in *Benjamin Franklin* contradicts rather than foreshadows its holding in *Associated Grocers*. The *Benjamin Franklin* court specifically disclaimed any intent to address the constitutionality of differing tax treatment of wholesalers and internal distributors. *See* 187 Wash. at 476. In *Air-Mac*, the court simply held that a particular business activity constituted a taxable distribution under Wash. Rev. Code § 82.04.270(2). The *Air-Mac* opinion does not even remotely suggest that differing tax treatment of wholesalers and internal distributors might be unconstitutional.

[10]In this regard, it is significant that the Washington Supreme Court majority cited not one decision of this Court in support of its equal protection holding. Furthermore, in that portion of its opinion, the majority cited no previous Washington decision in which the court had held any other statute unconstitutional. *See* 114 Wash. 2d at 187-88, 787 P.2d at 25 (Pet. 5a-6a).

fining Co., 287 U.S. 358, 364 (1932), this is not a substantial federal question. *See Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1952). Moreover, even if this due process question were substantial, it was neither properly raised nor decided in the state court, as explained above.

Therefore, the Court probably lacks jurisdiction to review the Washington Supreme Court's judgment.

III. THE PORTION OF THE WASHINGTON SUPREME COURT'S JUDGMENT THAT DENIED ASSOCIATED GROCERS ANY FORM OF RETROSPECTIVE RELIEF SHOULD BE DEEMED CORRECT BECAUSE THE WASHINGTON COURT ERRONEOUSLY HELD THAT THE PARTIAL TAX EXEMPTION IN QUESTION VIOLATES THE EQUAL PROTECTION CLAUSE.

The Washington Supreme Court majority unnecessarily addressed remedial and prospective application issues in its opinion because the court erroneously declared invalid the partial exemption in Wash. Rev. Code § 82.04.270(2) -- even though the court did so prospectively only. As the three dissenting justices below recognized, the partial exemption is rationally related to a legitimate state purpose and, therefore, is constitutional. The Washington court's refusal to provide retrospective relief to Associated Grocers was appropriate because the exemption was and is constitutional.

The Washington court's refusal to provide retrospective relief may be defended on any ground properly raised below, whether or not that ground was rejected. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). Because the logic of defending the judgment below on the basis that the exemption is constitutional "would not dictate affirmance" of the judgment, however, the State filed a cross-petition in this matter (No. 90-465). *See National Labor Relations Board v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

The reasons for the State's contention that the court below erroneously declared the exemption in violation of the

Equal Protection Clause are presented at length in the State's cross-petition, the State's reply memorandum, and the dissenting opinion below, *Associated Grocers*, 114 Wash. 2d at 191-97, 787 P.2d 27-30 (Pet. 10a-17a). To repeat them here would unnecessarily lengthen this brief in opposition.

CONCLUSION

For the reasons stated in this brief, Associated Grocers' petition probably should be denied for lack of jurisdiction. If the Court grants Associated Grocers' petition, however, the Court should also grant the State's cross-petition. Because the Washington Supreme Court's underlying equal protection holding so clearly deviates from accepted equal protection jurisprudence, the Court may wish to consider summary disposition of the matter, including remand to the Washington Supreme Court for reconsideration of the equal protection issue.

DATED this 4th day of December, 1990.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General
State of Washington

LELAND T. JOHNSON*
Assistant Attorney General

**Counsel of Record*

APPENDIX

SUPREME COURT OF THE STATE OF WASHINGTON

No. 55686-5

STATE OF WASHINGTON,

Appellant,

vs.

ASSOCIATED GROCERS, INC.,

Respondent.

RESPONDENT ASSOCIATED GROCERS' MOTION FOR CLARIFICATION AND RECONSIDERATION

I. IDENTITY OF MOVING PARTY

Respondent Associated Grocers, Inc. ("Associated Grocers") asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Associated Grocers seeks reconsideration of one aspect of this Court's March 1, 1990 decision, and clarification as to another. Clarification is requested to assure that Associated Grocers will be treated the same as distributors, where both relied on the validity of the exemption after it was extended to Associated Grocers by the Partial Summary Judgment entered by the trial court in this matter on March 29, 1988 (CP 29). A copy of the order is attached for the Court's convenience as Appendix A (herein the "March 29, 1988 Order").

Associated Grocers also seeks reconsideration of this Court's initial decision to reverse the trial court award of a statutory refund to Associated Grocers. The denial of that refund is itself a denial of equal protection to Associated Grocers for prior years and cannot be squared with the goal of fashioning equitable relief that is a blend of what is nec-

essary, fair and workable. *Bond v. Burrows*, 103 Wn.2d 153, 164, 690 P.2d 1168 (1984), cited in *State v. Associated Grocers, Inc.*, No. 55686-5, slip op. at 10 (March 1, 1990).

Associated Grocers does not seek reconsideration of this Court's holding that RCW 82.040.270 [sic] describes a single class of taxpayers that must be treated alike as a matter of constitutional law. *Associated Grocers*, slip. op. at 7. Nor does Associated Grocers seek reconsideration of the Court's decision to sever the unconstitutional exemption from RCW 82.04.270 prospectively for all members of the one taxpayer class designated in the statute. Instead, Associated Grocers seeks relief that encompasses two earlier time frames. For convenience, "interim period," refers to the period from March 29, 1988 to April 1, 1990.

By its March 29, 1988 order, the trial court ordered the exemption contained in RCW 82.04.270 extended to Associated Grocers on the same basis that it was then available to all other members of the one taxpayer class covered by that statute. This Court instead severed the exemption for all members of the taxpayer class as of April 1, 1990, but did so prospectively to avoid an assessment of back taxes on distributors who relied on the exemption in prior years. *Associated Grocers*, slip op. at 10.

First, Associated Grocers requests confirmation from the Court that it will be treated the same as distributors, and cannot be assessed additional tax for the interim period. [1]

Second, we address the time period prior to the trial court's decision of March 29, 1988, including the statutory refund period defined in RCW 82.32.060. Associated Grocers requests that the court reconsider its denial of monetary relief to Associated Grocers for the unconstitutionally unequal portion of the tax paid by Associated Grocers during the statutory refund period.

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[1]Associated Grocers believes that a fair reading of this Court's decision precludes an assessment of back taxes against Associated Grocers for the interim period, and its present request for clarification should not be construed as a suggestion to the contrary. It is made in an abundance of caution, only.

III. FACTS RELEVANT TO MOTION

The trial court, as affirmed by this Court, held that the legislature created one class of taxpayers under RCW 82.04.270, and that a partial exemption for some members of that class and not all violated the equal protection clause of the fourteenth amendment of the United States Constitution and the privileges and immunities clause of the Washington Constitution. To cure that unconstitutional inequality, the trial court extended the exemption to Associated Grocers by its March 29, 1988 order. To remedy the past denial of equal protection to Associated Grocers, the trial court also granted Associated Grocers a refund of the $9,938,529 in taxes collected in violation of Associated Grocers' equal protection rights. The refund amount included *only* the unequal and greater portion of the tax paid by Associated Grocers due to the unconstitutional denial of the exemption. It did not include the equal and therefore constitutional portion of the tax paid by Associated Grocers (and distributors) during the refund period.

The State appealed. This Court granted direct review and affirmed the trial court's ruling that by excluding Associated Grocers from the benefit of the exemption, RCW 82.04.270 violated the equal protection rights of Associated Grocers. Rather than extend the exemption to Associated Grocers, however, this Court chose to sever the exemption from RCW 82.04.270 as of April 1, 1990, providing a solely prospective remedy.[2] *See Associated Grocers*, slip. op. at 9.

By extending the exemption to Associated Grocers, the trial court specifically held that Associated Grocers was no longer required to pay the business and occupation tax to the extent the exemption applied to Associated Grocers after March 29, 1988. Associated Grocers relied on the March 29, 1988 order, and like internal distributors, did not pay

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[2]The parties briefed and argued whether the Court should sever the exemption or extend it to Associated Grocers. The parties did not brief and argue the separate issue of whether Associated Grocers should, in equity and as a matter of constitutional law, receive a refund if the exemption were severed rather than extended. Associated Grocers has always requested a refund; the State has never requested a solely prospective remedy.

that portion of the business and occupation tax from which it was exempt. Associated Grocers is thus entitled to an express holding that it shall not be subject to "back taxes" attributable to its reliance on the exemption after the March 29, 1988 order.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. THE COURT SHOULD GRANT RETROSPECTIVE AS WELL AS PROSPECTIVE RELIEF.

The constitutional underpinning of this Court's March 1, 1990 decision, and that of the trial court below, is that RCW 82.04.270 creates one class of taxpayers, and that equal protection of the laws requires that all members of that one class be treated alike. Thus this Court's holding that:

> The exemption in RCW 82.04.270(2) is applied only to distributors, and not to wholesalers. The members of the class are thus treated differently. The first inquiry under the *Yakima County* test, then, is answered 'no.' The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the 14th Amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. Article I, § 12). Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional.

Associated Grocers, slip op. at 6. That holding immediately followed this Court's succinct observation that:

> This Court has consistently treated distributors and wholesalers as members of a single class under the statute [RCW 82.04.270] and its forerunners. *See, e.g., Benjamin Franklin Thrift Stores Inc. v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936); *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970).

Id.

To assure "a tax equal" prospectively on all members of the one class of taxpayers covered by RCW 82.04.270, the trial court extended the subject exemption to Associated Grocers on the same basis that it was already available to

internal distributors. This Court instead chose to ensure equal treatment of all members of the class by severing the exemption from the statute prospectively from April 1, 1990. In doing so, this Court expressly noted that:

> Arguably distributors, who have benefitted for 30 years from an invalid exemption, should now be assessed for taxes they should have paid. However, all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of our decision in this case. We therefore apply our holding prospectively only. *See Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984).

Id.

The Court's reference to the *Bond* decision is of particular significance with respect to the "interim period" here, for as this Court observed in *Bond*, 103 Wn.2d at 164, 690 P.2d 1168, it is important to recognize:

> That we are acting within the framework of appropriate *equitable relief* with respect to an unconstitutional taxation statute * * * [and] In fashioning an equitable remedy, reliance interest weighs heavily, *and the court should seek a blend of what is necessary, fair and equitable*. (Emphasis added).

By prospective severance of the exemption, the Court has insured that for the future, all members of the one class of taxpayers covered by RCW 82.04.270 will be taxed alike. That remedy clearly implements the purpose of RCW 82.98.030 (the severance clause in RCW Title 82), and insures equal protection of the laws for all taxpayers covered by the statute on and after April 1, 1990. To thus focus entirely on the future, however, is to ignore this Court's own charge to act within the framework of appropriate equitable relief under the *Bond* decision.

Prospective severance alone is clearly an incomplete and therefore inappropriate remedy in this case. It fails to specifically foreclose the possibility of the assessment of an unconstitutionally unequal tax on Associated Grocers for the interim period. Prospective severance alone also serves to perpetuate the denial of equal protection suffered by As-

sociated Grocers prior to the trial court's March 29, 1988 order, including the statutory refund period covered by RCW 82.32.060. Indeed, the denial of a refund to Associated Grocers is itself a denial of equal protection of the laws to Associated Grocers, and in effect a judicial repeal of the refund statute RCW 82.32.060. Moreover, such a denial of retrospective monetary relief to Associated Grocers is both unnecessary and unfair. *Bond*, 103 Wn.2d 153, 690 P.2d 1168.

It is not necessary for the Court to choose between prospective severance and a retrospective refund to Associated Grocers, as if the two concepts were mutually exclusive. They are not, and in fact the correct remedy here is to apply both concepts in an equitable combination. Prospective severance of the exemption insures future equal taxation on all members of the one class of taxpayers under RCW 82.04.270. Equitable relief in the form of a retrospective refund to Associated Grocers for the statutory period is "necessary, fair and workable" given the fact that Associated Grocers paid an unconstitutionally unequal and greater tax than other members of the class during prior years. Prospective severance of the exemption, combined with relief during the interim period and a retrospective statutory refund to Associated Grocers, assures equal protection of the law both past and future.

B. ASSOCIATED GROCERS IS ENTITLED TO EQUAL TREATMENT DURING THE INTERIM PERIOD.

1. THE SUPREME COURT SHOULD CLARIFY ITS HOLDING BY AFFIRMING THE TRIAL COURT'S REMEDY THROUGH THE EFFECTIVE DATE OF THE SUPREME COURT'S HOLDING.

Both Associated Grocers and distributors relied upon the validity of the exemption after the trial court's March 29, 1988 order. It would be patently inequitable to leave Associated Grocers, but not distributors, exposed to an additional tax from that date to the present time. Doing so would amount to retrospective severance of the exemption as to *only* Associated Grocers. Indeed, it would be a denial of equal protection to permit the State to collect additional

tax from Associated Grocers for the interim period, but bar the State from collecting the same tax from other members of the class who also relied on the exemption.

It is equally worthwhile to note that Associated Grocers is clearly entitled to retrospective relief during the interim period under the three-part test adopted by this Court in *National Can v. Dep't of Revenue*, 109 Wn.2d 878, 724 P.2d 1286 (1988)[3] and applied by this Court in *Bond*, 103 Wn.2d 153, 690 P.2d 1168. The first question to be answered under that test is whether this Court's holding -- that RCW 82.04.270 establishes one class of taxpayers that must be treated alike -- "establishes a new principle of law, either by over-ruling past precedent upon which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed?" *National Can*, 109 Wn.2d at 882, 749 P.2d 1286. The answer here is clearly "no." This Court has consistently treated distributors and wholesalers as members of a single class under RCW 82.04.270 and its forerunners. *Associated Grocers*, slip op. at 6. That holding, which dates back more than 50 years to the 1936 holding of this Court in *Benjamin Franklin Thrift Stores, Inc. v. State*, 187 Wash. 472, 60 P.2d 86 (1936), is hardly "a new principle of law."

The second question to be answered under the *National Can* test is whether retrospective relief for Associated Grocers during the interim period would "further or retard" the legislative purpose of "a tax equal" under RCW 82.04.270, and equal protection of the laws. *National Can*, 109 Wn.2d at 888, 749 P.2d 1286. The answer here is clearly

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[3]Although tax refunds were denied in *National Can*, Associated Grocers brought that decision to the attention of the State and the trial court well before the trial court entered its March 29, 1988 Order extending the exemption to Associated Grocers. In at least tacit recognition of what we now show, the state has never urged that the rationale of *National Can* would justify denial of interim relief or a refund to Associated Grocers. In *National Can*, 109 Wn.2d 878, 749 P.2d 1286, the Court correctly granted the Department's request for prospective effect. However, the longstanding rule of retrospective effect of this Court's judgments should apply here. The internal consistency test developed by the United States Supreme Court in the *National Can* case. [sic] The test is whether a statute places an undue burden on interstate com-

"yes." To relieve distributors of liability for "back taxes" from the date of the trial court decision extending the exemption to Associated Grocers, but to deny the same relief to Associated Grocers during the same period, would be a manifest injustice. It would also be in direct conflict with the equal protection grounds on which this Court based its decision to sever the exemption for all members of the class from and after April 1, 1990.

The third question to be asked, with respect to the interim period and under the *National Can* test, is whether any inequities would be imposed by retrospective application of this Court's ruling that all members of the one taxpayer class under the statute must be treated alike. *Id.* at 890, 749 P.2d 1286. The obvious answer is "no." Again, it would be patently inequitable to relieve distributors of back taxes because they relied upon the exemption during the interim period, but to fail to do the same for Associated Grocers, who likewise relied upon the validity of the exemption as extended to it by the trial court in its March 29, 1988 order.[4]

This Court should, for the reasons just enumerated, expressly modify its March 1, 1990 decision to direct that the

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merce "on its face." The test hypothetically assumes that all states have enacted the statute being tested. *National Can*, 109 Wn.2d 878, 749 P.2d 1286. Although only a few jurisdictions assess B & O taxes and thus only a few taxpayers paid both in Washington and elsewhere, the *National Can* litigants nonetheless requested refunds in excess of $56,000,000 for their largely hypothetical injury. *Id.* at 893, 749 P.2d 1286. The unequal and greater tax paid by Associated Grocers by reason of the unconstitutional denial of the exemption to it is not hypothetical. As the *National Can* Court recognized, retroactive treatment there would have relieved some taxpayers of their fair share of the tax burden. *Id.* at 889-890, 749 P.2d 1286. That is not so here, where Associated Grocers has paid and does not seek a refund of its fair share of the equal and therefore constitutional portion of the tax imposed by RCW 82.04.270. Associated Grocers only seeks a refund of the unequal, greater, and unconstitutional portion of the tax paid by Associated Grocers and not paid by other members of the same class.

[4]Potential hardship to the State must also be considered. *National Can*, 109 Wn.2d 878, 749 P.2d 1286. Equal treatment of Associated Grocers and distributors during the interim period, however, imposes no hardship whatsoever on the State. The State has neither received nor relied upon the additional taxes which Associated Grocers would have paid during the interim period absent the March 29, 1988 order.

State may not assess or collect from Associated Grocers taxes withheld by Associated Grocers under the exemption in reliance upon the trial court's March 29, 1988 order. As we next show, the refund ordered by the trial court should be reinstated for similar reasons of fairness and equity.

C. ASSOCIATED GROCERS IS ENTITLED TO A STATUTORY REFUND OF TAXES COLLECTED BEFORE THE TRIAL COURT'S DECISION.

The Court states, in denying a refund to Associated Grocers, that:

> Tax refunds are not mandated when a statutory scheme is found to be unconstitutional except when taxes were collected in violation of the Constitution. *See National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, ___ U.S. ___, 100 L.Ed.2d 615, 108 S. Ct. 2030 (1988). Associated does not argue that the tax levied under RCW 82.04.270(1), which it paid and for which it seeks a partial refund, is unconstitutional.

Associated Grocers, slip op. at 9.

Whereas the reference to the *National Can* decision is proper, the Court has misunderstood the contention of Associated Grocers. Because of the denial of equal protection found by this Court, Associated Grocers paid an unequal and greater tax than distributors paid under the statute. To the extent of that greater tax, Associated Grocers paid "an unconstitutional tax." The refund awarded by the trial court covered only the unequal and greater portion of the exaction, and did not include the equal and therefore, lawful portion of the tax paid by both Associated Grocers and distributors under RCW 82.04.270. The refund, in short, covered only taxes collected from Associated Grocers "in violation of the Constitution." As a result, the refund was properly awarded to Associated Grocers under the *National Can* analysis.

Whereas a tax refund is "not *always* mandated," a tax refund is necessary where appropriate under the three part *National Can* test. *National Can*, 109 Wn.2d at 881, 749 P.2d 1286 (emphasis added). Indeed, applying the *National*

Can test to this Court's decision -- that the unequal tax is unconstitutional -- it is clear that this decision should operate retrospectively to provide a refund of the unconstitutional portion of the tax to Associated Grocers. Application of the Court's decision in that fashion would be based upon no "new principle of law." *Associated Grocers*, slip op. at 6. An equitable remedy is required. *Bond*, 103 Wn.2d 153, 690 P.2d 1168. Moreover, a refund will clearly promote rather than retard equal protection of the laws, which is the core element of this Court's decision. The first and second tests adopted in *National Can* are thus satisfied with respect to the grant of a refund to Associated Grocers.

The third element of the *National Can* test is also satisfied, because no party will be subject to inequality by the award of a statutory refund to Associated Grocers. *National Can*, 109 Wn.2d at 890, 749 P.2d 1286. Distributors will be totally unaffected, and Associated Grocers will at least be made partially whole for the unconstitutionally unequal and greater tax it paid during the statutory refund period. The State is permitted to keep the unconstitutionally greater portion of the unequal tax collected from Associated Grocers for more than 20 years prior to the statutory refund period, and the State gains substantial new revenues from distributors as a result of the prospective severance of the exemption. It would, we submit, be difficult to conceive of a more equitable "blend of what is necessary, fair and workable" for all concerned. Unfairness arises only if Associated Grocers is denied relief for the interim period, and denied a refund for the statutory period.

D. FEDERAL LAW MANDATES THE REQUESTED RELIEF.

Finally, to deny Associated Grocers relief during the interim period and the refund ordered by the trial court would be to deny Associated Grocers equal protection under federal constitutional law. As stated in *Carpenter v. Shaw*, 280 U.S. 363 (1930), a state court's failure to refund the taxes unlawfully collected violates fourteenth amendment rights to equal protection of the law:

A denial by a state court of a recovery of taxes exacted

> in violation of the laws or constitution of the United States by compulsion is itself in contravention of the 14th Amendment.

Id. at 369. *See also, Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (ordering State whose tax statute violated the commerce clause and supremacy clause to provide a tax refund); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 447 (1922).

Thus, also, the holding in *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 449, 504-5 (1928), where the Court stated:

> [The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

An equal protection tax case squarely on point is *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931), where the Court stated that:

> The petitioner's rights were violated, and the cause of action arose, when taxes at lower rates were collected from their competitors.

The Iowa-Des Moines Bank decision remains vital law today. The United States Supreme Court continues to rely on the straightforward analysis and conclusion of that decision, and cited it with approval in *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S. Ct. 1500 (1989), and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S. Ct. 633 (1989).

V. CONCLUSION

This Court has properly found that the exemption contained in RCW 82.04.270 is, as written, an unconstitutional denial of equal protection of the laws to some members of the one class of taxpayers described in that statute. Prospective severance of the exemption properly cures that constitutional defect, but only for the future. Absent retrospective relief, the monetary injury suffered by Associated Grocers from the past denial of equal protection goes

unabated. The more complete and therefore correct remedy here must include express relief for Associated Grocers during the interim period since the trial court's extension of the exemption to Associated Grocers on March 29, 1988, and reinstatement of the trial court's statutory refund. Prospective severance of the exemption implements the severance clause of RCW title 82, assures equal treatment of all members of the class prospectively, and provides the State with additional revenues. Interim relief assures equal treatment of Associated Grocers and distributors since March 29, 1988, and imposes no hardship on the state or those distributors. Award of a statutory refund to Associated Grocers implements RCW 82.32.060, furthers the purpose of equal protection and the legislative intent of "a tax equal," and abates the past discriminatory treatment of Associated Grocers. Distributors are wholly unaffected by the refund, and any resulting hardship to the state is more than offset by future tax revenues the state will receive as the result of prospective severance of the exemption of all taxpayers covered by RCW 82.04.270. The goal of fashioning equitable relief that is necessary, fair and workable under the standard laid down by this court in *Bond*, 103 Wn.2d 153, 690 P.2d 1168, is thus attained by a meaningful combination of prospective severance, interim relief, and a statutory refund to Associated Grocers. This Court should modify its March 1, 1990 decision accordingly.

DATED this 21st day of March, 1990.

BETTS, PATTERSON & MINES, P.S.
Attorneys for Respondent
Associated Grocers, Inc.

By /s/ Paul D. Carey
PAUL D. CAREY, WSB# 00435

By /s/ Livingston Wernecke
LIVINGSTON WERNECKE,
WSB# 05000

By /s/ Margaret E. Wetherald
MARGARET E. WETHERALD,
WSB# 13917

Supreme Court, U.S.
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No. 90-281

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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REPLY BRIEF OF PETITIONER

PAUL D. CAREY
(Counsel of Record)
LIVINGSTON WERNECKE
MARGARET E. WETHERALD
BETTS, PATTERSON & MINES, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle, WA 98161-1090
(206) 292-9988

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

The Supreme Court of Washington, after holding that a state tax exemption "violates [petitioner's] rights under the Equal Protection Clause of the Fourteenth Amendment" (Pet. App. 6a), nevertheless ruled that "the proper remedy consists solely of [prospectively] striking the offending tax exemption." (Pet. App. 2a) We showed in our petition that the state court decision, rendered shortly before this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages*, No. 88-192, 110 S. Ct. 2238 (June 7, 1990), was flatly inconsistent with *McKesson* and the cases on which it was based.

The State's brief in opposition makes no serious response to our showing on the merits. Instead, the State attempts three diversionary tactics.

1. First, the State suggests that because petitioner did not use the words "due process" in its papers in the state courts, it failed to preserve the claim it makes here. (Br. in Opp. 6) That contention is unfounded. Petitioner's reconsideration motion to the Supreme Court of Washington [1] set forth the very claim petitioner now makes:

> Prospective severance alone is clearly an incomplete and therefore inappropriate remedy in this case . . . Prospective severance alone . . . serves to perpetuate the denial of equal protection suffered by Associated Grocers prior to the trial court's March 29, 1988 order, including the statutory refund period covered by RCW 82.32.060. (Resp. App. 5a-6a)

In support of this claim, petitioner cited and discussed at length the same decisions of this Court upon which the holding in *McKesson* was based,[2] including *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); and *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). No more is required.

2. Respondent then makes the extraordinary assertion that the Washington Supreme Court did not actually invalidate the exemption retrospectively at all, but that the effect of its holding was "to declare that the partial exemption . . . was constitutional and valid during all periods prior to April 1, 1990." (Br. in Opp. 8) But absolutely nothing in its opinion suggests that the state court thought the exemption had ever been constitutional. What the court said was:

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[1] See the appendix ("Resp. App.") to the brief in opposition ("Br. in Opp.") 1a-12a.

[2] See Resp. App. 10a-11a.

> The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. art. 1, § 12). Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional.
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> [Petitioner's] contention, with which we agree, is that the partial exemption granted distributors under RCW 82.04.270(2) is unconstitutional. (Pet. App. 6a-9a)

After ruling the exemption unconstitutional, the state court turned to the question of remedy, ruling that the *remedy* should be prospective only, which is exactly what *McKesson* forbids. Respondent, citing *American Trucking Ass'n., Inc. v. Smith*, 110 S.Ct. 2323 (1990), tries to reverse engineer the erroneous ruling on remedy into a prospective-only holding on the underlying constitutional issue, but *ATA* itself forbids this: "[this] Court has never equated its retroactivity principles with remedial principles." *Id.* at 2336.

3. Finally, respondent restates portions of its cross-petition in No. 90-465. Petitioner has shown in its brief in opposition to that cross-petition that respondent's contentions are without merit.

CONCLUSION

The *McKesson* decision is controlling law which requires, under the Due Process Clause of the Fourteenth Amendment, that the Washington courts provide meaningful retrospective relief where unconstitutional state tax legislation results in an unlawful exaction under duress. The State of Washington has denied that due process safeguard to petitioner in this case. In the absence of action by this Court, petitioner and other Wash-

ington litigants will be denied the meaningful retrospective relief required under *McKesson*.

In *McKesson*, the Court noted that Florida could cure its discriminatory tax "through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period." 110 S. Ct. at 2258. The Court reversed and remanded for further proceedings.

In the present case, the Supreme Court of Washington did not have the guidance of this Court's opinion in *McKesson*, which was decided shortly after the state court denied reconsideration. Accordingly, the Court may wish to consider a summary remand of this case so that the state court may reconsider its denial of retrospective relief to Associated Grocers in light of *McKesson*.

Respectfully submitted,

PAUL D. CAREY
(Counsel of Record)
LIVINGSTON WERNECKE
MARGARET E. WETHERALD
BETTS, PATTERSON & MINES, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle, WA 98161-1090
(206) 292-9988

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for Petitioner